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masters ; and when to ascertain what the pay and emoluments are, we have to resort to the third section of the act of 1816, and there find it to be those of a major : the law must mean a regimental and not a staff major—a major of infantry. Certainly, it should not be tortured to mean a major of one of the arms of defence or kinds of regiment, of which there is none in the army. When the act of 1816 was passed, cavalry did not form a part of the army ; consequently, no such rank as major of cavalry existed, by which the pay of paymasters could have been graduated. But it was urged in argument, that there was such a thing as the pay of a major of cavalry, subsisting in legal contemplation. There was ; but for no other purpose than as giving the standard of pay to certain staff officers. It is not probable, that congress, when fixing the pay of paymasters, referred to what only existed in contemplation of law ; in preference to what existed in fact, to guide its determination.

But another, and the only remaining consideration to which we shall allude, as decisive of the interpretation here given to the third section of the act of 1816, is the contemporaneous exposition and practice under it, by the accounting officers of the treasury, and acted upon by congress, when, five years afterwards, it re-organized the pay department of the army. The ninth section of the act of the 2d of March 1821, to reduce and fix the military peace establishment, declares, that there shall be one paymaster-general, with the present compensation, and fourteen paymasters with the pay, &c., of regimental paymasters. This act, in reference to the paymaster-general, is positive in continuing the existing compensation ; and the term regimental, applied to the paymaster, is to be taken in the sense in which it is used in the act fixing the peace establishment, or to the kinds of regiment of which the army was to be composed ; and as continuing the paymasters upon the footing they actually were, and had been for five years, in regard to pay and emoluments. Congress knew what these were, and cannot be supposed to have intended to re-enact the law of 1816, with the construction of it here contended for ; in opposition to the practice of the treasury department under it.

Judgment affirmed.

*MATTHEW ST. CLAIR CLARKE, Plaintiff in error, v. CONRAD [*657
KOWNSLAR.

Charge of the court.

The circuit court were required to instruct the jury upon points of law growing out of allegations of facts, of which there was no evidence or proof ; the refusal of the court to do so was correct.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Coxe*, for the plaintiff in error ; and by *Dunlap* and *Key*, for the defendant.

The court, in their opinion, having decided that none of the questions which were argued, were presented by the evidence in the circuit court, the arguments of counsel on those questions are omitted.

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STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. Kownslar brought the original action in November 1832, against Clarke, upon the following letter of guaranty :

“Conrad Kownslar :

Mill Creek, Virginia.

Dear sir :—If you will make James Miles of this city your agent, as you intimated to him, I will see your money paid in due course of sales. He asks five per cent. commission ; and will take all intended for this market. He wishes an answer. Your obedient servant,

MATTHEW ST. CLAIR CLARKE.”

“Washington, the 27th of September 1828.

Kownslar received the letter ; and sent paper accordingly to Miles, between November 1828, and December 1829, amounting (as the declaration avers) to the value of \$8396.75, part of which paper was afterwards returned, and upon the sales of the residue there remains due and unpaid (as the declaration avers) to Kownslar, the sum of \$4238.62½, after deducting commission, to recover which sum the action was brought. *At the trial, *658] upon the general issue, a verdict was found for the plaintiff, upon which judgment was rendered in his favor ; and the present writ of error is brought to revise that judgment.

Two bills of exception were taken, the second only of which is now before the court for consideration, excepting only so far as the evidence contained in the first is referred to in the latter. It appears from these bills of exception, that, at the trial, the plaintiff offered in evidence the letter of guaranty, and then the testimony of Miles, who proved, that he was a commission-merchant, in the city of Washington, for the sale of paper and other articles of stationery ; that he received consignments of such articles from several persons, who were not in any manner secured or guarantied by any persons for their consignments ; and he also further testified, that after the said letter was written, the plaintiff sent sundry packages of paper to him for sale ; and that before he sent the same, he informed Miles, that he had received the said letter from the defendant, and should send it. On cross-examination, he further proved a letter (dated November 4th, 1828), accompanying the packages first sent, and also certain articles of agreement entered into between Clarke and the witness (dated the 1st of October 1828), both of which papers are in the record ; and that, after the said paper was received from the plaintiff by Miles, the defendant (Clarke) knew of it, and was then, and afterwards, in the habit of inspecting the books kept by the witness, in which the paper, as received by the witness from the plaintiff, and the sales made thereof from time to time, as the same was received and sold, were entered. He further testified, that on the 28th of April 1830, he terminated his business as such commission-merchant, and made a general assignment of all his stock, books, &c., to the defendant, who took possession, under the same, of various articles then in the store of Miles ; but he never did take possession of, or exercise any control over, the paper so lying in his said store belonging to the plaintiff ; but the same was delivered to, and received by the plaintiff. The assignment was then introduced.

These are all the facts stated in the first bill of exceptions. The second

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proceeded to state, that after the testimony so given, the plaintiff proved, by Miles, that the usage and practice of commission-merchants in the city of Washington was to sell, either on credit or cash, the articles consigned. But that as soon as the proceeds of sales are received by such commission-merchant, he at once becomes responsible to the consignor for the proceeds, and is not entitled to *any credit for the same. He further gave in evidence the books of Miles, and two certain drafts for \$1000 each, [*659 with the indorsements and protests of the same. Each of these drafts was dated Mill Creek, October 31st, 1829, drawn on Miles, and payable to the order of Lewis Hoff, Esq., cashier, one in ten days after date, the other in thirty days after sight ; and were each accepted by Miles on the 5th of November of the same year.

The plaintiff further offered to prove by Miles, and he testified, that when he accepted these drafts, he had no funds from the collection of sales of the plaintiff's paper ; but he accepted the same in expectation of making such collections, which, however, he was not able to make. The defendant then gave in evidence certain letters of the plaintiff to Miles, dated on the 13th of May, and the 17th of October 1829. The first letter, after speaking of paper sent, and of other paper of the plaintiff on hand, &c., added, "you will please to send me a check for the amount you advised I should draw on you for at thirty days. By so doing you will have eight to ten days after date, till it will be presented for pay." The second, after asking for information by the bearer, how Miles comes on with the sale of his paper, &c., added, "my draft, I presume, will be presented soon. I hope you will not suffer it to be returned." The plaintiff then read to the jury the account between him and Miles, showing the amount claimed in the suit.

The defendant's counsel then prayed the court to instruct the jury as follows : that if they shall believe from the said evidence, that according to the ordinary usage of the business of commission-merchants in the city of Washington, in which Miles was engaged and in which he acted in receiving, selling and accounting for the paper consigned to him, no credit was allowed or given to such commission-merchant, and that, without the knowledge, privity or consent of the said defendant, the plaintiff drew upon Miles for the sums of money, which he had received as the proceeds of said sales of his paper, so made by Miles, which drafts were payable at distant days or periods, that then such drafts, so drawn as aforesaid and accepted by Miles, payable according to their tenor, amount to a credit given by the plaintiff to Miles ; and that such credit, so given, constitutes a new agreement and discharges the defendant from his liability on his said letter of guaranty. The court refused to give the instruction as prayed ; and to this refusal the defendant excepted : *and the propriety of this refusal constitutes [*660 the sole point for our consideration.

We give no opinion upon the instruction, as matter of law, because we are of opinion, that there was no evidence whatsoever before the jury, which called upon the court to give it ; and that upon this account it was properly refused. There was no proof before the jury, that Miles, at the time of the acceptance of the drafts, had any money in his hands, which he had received as the proceeds of the sales of the paper of the plaintiff. The drafts being payable at future times, the mere acceptance of them by Miles did not establish any such fact ; for it is a known and ordinary course of

New Orleans v. United States.

business for such acceptances to be made, not only when the acceptor has funds in his hands, but also when funds are expected to be received by him before the maturity of the drafts ; and indeed, often for the accommodation of the drawers, when the acceptor, being a commission-merchant, has the property on hand, out of the sales of which he expects to reimburse himself for the advance. The theory of the law, which supposes the acceptor to have funds of the drawer in his hands, is a theory mainly intended for the security of third persons, and leaves the transaction to be judged of, between the parties themselves, according to the ordinary course of business between them. But without resorting to these considerations, the fair presumption would seem to be, in cases like the present, that drafts, drawn payable at future periods, were designed to reach funds not yet received, but to be received at the maturity of the bills. The present case, however, does not stand upon presumptions. Here is positive proof from Miles (who seems to have been the only witness in the case), that at the time he accepted the bills, he had no funds in his hands, but that he expected to make collections, which, however, he did not make. And the written documents, in no shape, shake his testimony. Indeed, a part of the very instruction, as framed, seems founded upon the credibility of that testimony. So that we do not perceive how, consistently with the rules of law, the instruction could be given, as there was no evidence before the jury conducing to prove the facts on which it was founded. The judgment is, therefore, affirmed, with six per cent. damages and costs.

THIS cause came on to be heard, on the transcript of the record
 *661] *from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*662] *The MAYOR, ALDERMEN and INHABITANTS of NEW ORLEANS,
 Appellants, v. UNITED STATES.

Dedication.—Alluvion.—Grant.

The United States alleged, by a petition presented to the district court of the United States for the district of Louisiana, that by the treaty of cession of the late province of Louisiana, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the province, the dominion and possession thereof, including all lands which were not private property ; and that certain lots and vacant lands in front of the city of New Orleans, which the petition asserted passed to the United States by the cession, had, by an ordinance of the city, been directed to be sold for the use of the city ; the petition prayed, that the city of New Orleans should be perpetually enjoined from selling the same, or doing any other act which should invade the rightful dominion of the United States over the said land, or their possession of it. The city of New Orleans claimed the ground, which lies between the line of the front houses of the city and the river Mississippi. 1st. As having been left by the king of France as quays, for the use and benefit of the city ; 2d. Because if, since the foundation of the city, the space of ground became wider than was necessary for the use of the city, as quays, it was occasioned by alluvial deposits in front of the city, in consequence of works erected by the inhabitants, at the expense of the city, to advance the levee in front on the river ; 3d. Because, by the laws of Spain, in force when the alluvions were reformed in front of the city,