of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents.

If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form *of property, real or personal, with the [*83 exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation, and there is no Federal power under the Constitution which can impair this exercise of state sovereignty.

We think the law of Louisiana imposing the tax in question is not repugnant to any power of the Federal government, and consequently the judgment of the Supreme Court of the state is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

The United States, Plaintiffs in error, v. McKean Buchanan.

Commissions for drawing bills of exchange were not usually allowed to permanent pursers in the navy; and on the 10th of November, 1826, commissions for such services to commanders of squadrons and officers of any grade were expressly abolished.

A custom cannot be set up against a settled rule; nor can it ever be binding unless it be ancient, reasonable, generally known, and certain.[1]

There are two books for the government of the officers of the navy, usually known as the "Blue Book" and the "Red Book." The "Red Book," although later in date, did not repeal the "Blue Book," except in some few specified particulars.

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[1] Cited. *Tilley* v. *County of York*, 3 Otto, 163; s. c. 2 Morr. Tr., 351. *Adams* v. *Otterback*, 15 How., 539; *The Lucy Ann*, 23 Law Rep., 545; *Wilson* v. *Bauman*, 80 Ill., 493; *Mobile &c. Ry. Co.* v. *Jay*, 61 Ala., 247; *Swift & Courtney &c. Co.* v. *United States*, 15 Otto, 691.

The duty of paying mechanics and laborers at the navy-yards was imposed, by the Blue Book, upon pursers who were stationed there. It was made a part of their official duty. As this was not repealed by the Red Book, no commission can be allowed to a purser for performing this service.[2]

The question, whether or not these acts were part of the official duty of pursers, was one of law, to be decided by the court, and not of fact to be left to the jury.

Losses alleged to have been sustained by a purser, in consequence of an order by the commodore forbidding certain sales of slops, cannot be set off in a suit by the United States upon the purser's bond.

The statute of March 3, 1797, which allows set-offs, has for its object the settlement between the parties of their mutual accounts or debts. But wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off.[3]

It appears also that the government is not responsible for a wrong committed by one officer upon another. The party injured has other modes of redress than setting off the damages as a defence, when sued upon his bond by the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Pennsylvania, *having been carried there from the District Court, in which it originated.

*84]

It was a suit brought by the United States against Buchanan, who was a purser in the navy, to recover a balance of $11,535.50, alleged to be due by him. It was brought upon three several bonds, which had been executed by him on the 28th of February, 1836, the 24th of November, 1830, and the 24th of February, 1834. The defence was, that he was entitled to certain credits which the accounting officers of the government had refused to allow.

The items for which the defendant claimed credit were:—

1. Charge of commission for drawing bills of exchange $1,601.86
2. Charge of commissions on payments to mechanics and laborers at navy-yard, Pensacola . 1,955.61
3. Loss of commissions and depreciation of property 9,360.31
4. Loss of commissions on sale of slops . . 385.52

It will be necessary to take up these several items in order, after a few general remarks.

The act of Congress passed on the 7th of February, 1815, (3 Stat. at L., 202,) directed the Board of Navy Commissioners to prepare such rules and regulations as shall be necessary for securing responsibility in the subordinate officers and agents of the navy department. In obedience to this act, the Board of Navy Commissioners prepared a set of "Rules, Regu-

[2] FOLLOWED. *United States* v. *Brown*, 9 How., 500. See Rev. Stat., § 1764.

[3] S. P. *United States* v. *Williams*, 5 McLean, 133; *Ware* v. *United States*, 4 Wall., 617; *United States* v. *Wells*, 2 Wash. C. C., 161.

lations, and Instructions for the Naval Service of the United States," which were published in Washington in 1818. This is the book which is referred to, both in the subsequent arguments of counsel and opinion of the court, as the Blue Book. Its bearing upon the several claims of the defendant, Buchanan, will be mentioned when they come to be noticed *seriatim*.

The Red Book was published at Washington in 1832. Its title was, "Rules of the Navy Department regulating the Civil Administration of the Navy of the United States." The order of the then Secretary of the Navy, prefixed to the book contained the following sentence:—

"The 'Rules, Regulations, and Instructions' for the naval service, as published in 1818, relate to other branches of administration in this department, and, in most particulars, are entirely distinct in their character. They are now undergoing a thorough revision; and when corrected and enlarged, if approved by the competent authority, they will be separately printed and forwarded to those interested in their contents."

In this Red Book, at page 49, there is the following note to chapter 57, which treats of the printed regulations of 1818:—

*"*Note.*—Except in these two particulars, [which are mentioned in the page to which the note is attached,] and in others in which they have been expressly amended, these regulations are now in full force; their force being derived from the provisions of the act of Congress of the 7th of February, 1815, and from the sanction of the President and Secretary of the Navy, who have power to adopt any naval regulations, though not within the purview of the act of 1815, if not violating any law of Congress, and if supposed by them to be beneficial in their operation." [*85

We will now take up the separate credits which were claimed by the defendant.

1st. Commission for drawing bills of exchange.

There was no dispute about the amount of bills drawn. A certificate of Mr. Dayton, the Fourth Auditor, stated them to amount to $65,074.34; that they were drawn on the Secretary of the Navy, at various times from the 24th of May, 1827, to the ninth of February, 1828, by whom they were duly honored, and the amount thereof charged to Purser Buchanan on the books of the office.

In 1826, the two following orders were issued by the Secretary of the Navy, in the form of a letter of instruction to the Fourth Auditor.

"*Navy Department, 9th November*, 1826.

"SIR,—Instructions have been transmitted to the com-

manders of our several squadrons abroad, to obtain the funds required for their support from the navy agent near their respective states.

"No percentage or premium will hereafter be allowed to officers of any grade making drafts upon the department, unless they are too remote from the residence of any navy agent to procure the money.

"I am, respectfully, &c.,

(Signed,) SAMUEL L. SOUTHARD.

"TOBIAS WATKINS, ESQ., *Fourth Auditor of the Treasury.*"

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office.

A. O. DAYTON.

"*Treasury Department, Fourth Auditor's Office, July* 5, 1844."

"*Navy Department*, 10*th November*, 1826.

"SIR,—In reply to the inquiry contained in your letter of yesterday's date, I have to inform you that the allowance of premium or percentage, to officers drawing bills on the department *would cease from the time the officers shall severally receive instructions on the subject.

*86]

"I am respectfully,

(Signed,) SAMUEL L. SOUTHARD.

"TOBIAS WATKINS, ESQ., *Fourth Auditor of Treasury.*"

"I certify the foregoing to be a true copy of a letter from the Navy Department, on file in this office.

A. O. DAYTON.

"*Treasury Department, Fourth Auditor's Office, July* 5, 1844."

2d. Charge of commission on payments to mechanics and laborers at the navy-yard, Pensacola. These payments were made from October, 1835, to December, 1837, and amounted to $91,015.05, on which a commission of 2½ per cent. was charged.

The Blue Book, at page 100, when treating of the duties of a purser, said,—"Every purser of a yard shall settle his accounts at the treasury every twelve months," &c., &c. But it nowhere recognized the allowance of a commission.

3d. Loss of commissions and depreciation of property.

4th. Loss of commissions on sales of slops.

These two items belong to the same head, and must be treated together.

The ship's stores under the purser's control are of two kinds, called public stores, or slops, and private stores. Both descriptions are purchased with the money of the government,

but they are differently situated with respect to the commission which the purser receives upon their issue and consumption by the ship's crew. There was no dispute in this case about the first-mentioned class. The purser claimed a commission of ten per cent., which was allowed to him in the settlement of his accounts. The controversy was confined to the second class.

In May, 1839, the frigate Constitution sailed for the Pacific. She was commanded by Captain Turner, and the defendant was the purser. On board of her was Commodore Claxton, the commander of the squadron on the Pacific station. Early in the year 1840, Commodore Claxton issued an order, that, upon clothing taken from the private stores of the purser, there should not be charged a greater advance than ten per cent. The defendant remonstrated, and a long correspondence ensued; but he was compelled to submit, and during the rest of the voyage he disposed of his stores at that advance, instead of the larger premium to which he considered himself entitled. It is unnecessary to state the particulars of the claim, or the reasons on which it was founded, because the court did not consider it a proper set-off in this action, even if the allegations of the defendant had been well founded.

*The suit was brought by the United States, in the District Court, in May, 1844. It was an action of debt brought upon the three bonds mentioned in the commencement of this statement. The defendant pleaded *non est factum* and performance, and claimed to set off the items of account above mentioned, which had been rejected by the accounting officers. Before the trial, the counsel filed the following agreement:— [*87

"It is agreed, that, under the pleadings in this case, the question to be submitted, tried, and determined is the correctness of the credits, or any of them, claimed by the defendant in his account current with the United States under his old bond, and under the date of March 1, 1844, and which were disallowed in the reconcilement of his accounts by the Treasury Department, bearing date on the 27th of March, 1844; the said question to be considered as if arising under special pleadings in the cause. Credits claimed, if allowed, to be noted as of the date when they originated, with a view to future adjustment under his respective bonds.

H. M. Watts,

"*May* 16*th*, 1845. *Of special Counsel for Plaintiffs.*

G. M. Wharton,

For the Defendant."

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The counsel for the United States then offered in evidence,—

1. The above agreement.

2. The three bonds of the defendant.

3. The treasury transcripts, which exhibited a balance due by the defendant to the United States of $11,535.50, with interest from the 1st of March, 1844.

The evidence on the part of the defendant consisted of the correspondence which had passed between himself and Commodore Claxton and others; and also testimony, oral and documentary, upon the respective binding authority of the Blue and Red Books; and also upon the custom and usage of the navy with respect to pursers' commissions. Upon the last point, the United States produced a great deal of counter evidence.

The evidence being closed on both sides, the counsel of the plaintiffs then and there respectfully prayed the court to charge the jury,—

1. That the rules, regulations, and instructions for the naval service of the United States, prepared by the Board of Naval Commissioners, and approved by the Secretary of the Navy, on the 17th of September, 1817, and particularly those under the head of "Pursers," Nos. 12, 13, 14, were in full force, and *obligatory on defendant during the time he served as purser on the Pacific station, from 1839 to 1842, under Commodore Claxton.

*88]

2. That defendant had no right to issue slops, wearing apparel, or materials of which wearing apparel was made, at a greater profit than ten per centum.

3. That the issue of slops and private purser's stores was under the control of the commander, and that it was his right and duty, if he thought the interests of the government and the crew required it, to restrict such issues of private stores.

4. That if the jury believe that upwards of seventy pieces of silk handkerchiefs were issued from the purser's stores without the approval of the commander, such an issue was contrary to the regulations of the service, and justified the commander in restricting the future issues by the purser.

5. That the order of Commodore Claxton and Captain Turner to Purser Buchanan, to limit his profit to ten per cent. on the cost of slops and wearing apparel, and the materials of which wearing apparel was made, was conformable to law and the regulations of the naval service.

6. That the United States are not responsible to the defendant for any supposed loss of commissions and depreciation

of property arising out of the enforcement of the above order, or the conduct of Commodore Claxton.

7. That if the order of Commodore Claxton was illegal, and loss actually resulted to the defendant, the United States would not be responsible in this action.

8. That damages arising out of torts cannot be set off.

9. That unliquidated damages arising out of the conduct of Commodore Claxton to defendant cannot be set off against the claim of the United States in this suit.

10. That defendant, in an action against him by the government, cannot set off a claim which depends upon the pleasure of the government, and is not susceptible of legal enforcement.

11. That the defendant cannot set off prospective profits, which he might have made if he had been permitted to sell to the crew without restraint; nor is the government responsible for any depreciation of property.

12. That there can be no usage recognized by our courts which is contrary to law, and that the evidence given by defendant of a practice to charge twenty-five per cent. on wearing apparel, and materials of which wearing apparel is made, is of a practice contrary thereto.

13. That the charge of two and a half per cent. by defendant, for drawing bills of exchange upon the government, is not warranted by law, and ought not to be allowed.

*14. That the charge of commissions by defendant for disbursing money of the government, in payment of [*89 mechanics and laborers at the navy-yard, Pensacola, is not warranted by law, and ought not to be allowed.

15. That the orders of the Secretary of the Navy, of the 20th of March, 1840, and 2d of December, 1840, were not intended by the Secretary, nor do they or either of them contain an assumption or agreement on the part of the government, to pay any loss of commissions or depreciation of property complained of by Purser Buchanan.

16. That the United States, by the agreement filed by the counsel of both parties in this cause, and the evidence, is entitled to recover a verdict for the sum of $11,535.50, with interest from March, 1844, as appears by the Treasurer's transcript referred to in said agreement.

And the learned judge charged the jury.

And thereupon the counsel for the plaintiffs excepted to said charge generally, and to every part thereof, and in addition to such general exceptions, and without prejudice thereto, specified the following exceptions, viz.:—

That the said judge, in answer to the first, second, third,

fourth, and fifth, and twelfth prayer for instruction, charged the jury,—

"That the commander of a vessel of war has a right to issue orders in relation to the discipline of his ship, and the conduct of his officers on board, and to enforce these orders, he being responsible for any abuse of it. It is also his right to control the issues of stores by the purser, and, if he thought the interest of the government or of the crew required it, to restrict the issues of such stores to a proper quantity; but he had no right to reduce or control the prices at which such stores should be issued, that being fixed by the rules and regulations, and the usages and customs, of the navy. Was there, then, a fixed price or rate of advance which the purser had a right to charge on these articles, and if so, what was it? And was it charged by the order of Commodore Claxton?

"On behalf of the United States, it is contended that the rules and regulations prepared by the Board of Navy Commissioners, and published in 1818, were in full force, and that by these, 'all articles of wearing apparel, and materials of which wearing apparel is made, to be charged as slops,' and an advance of ten per cent. only allowed.

"It is admitted, that, so far as these rules and regulations are not opposed to an act of Congress, and subsequent rules and regulations they are in force; but is it contended that these *do not extend to the private stores of the purser, but only to those purchased by the government; or if they do, that the rule is superseded by the regulations issued in 1832, which were in full force in 1839–40.

*90]

"I deem it unnecessary to detain you by an examination of the first view, as I think the last is correct; although the rule or section referred to in the Red Book, on the face of it, purports to bear date 27th July, 1809, and may have been suspended by the rules of 1818 (as to which, however, it is unnecessary to decide). I consider the incorporation of it in the rule of 1832 as a new issue of that date, and binding from the time of its promulgation, although it may conflict with the rules of 1818.

"Each successive secretary or head of a department has the same right as his predecessor to give a construction to the laws, or regulations, or usages, of the business of his department; and the construction given by the last will be binding until changed by his successor. This construction of the rules of 1832 has been adopted, not only by the accounting officers of the government, but by Congress. (See an act for the relief of E. B. Babbit, March 2d, 1833.) The rules of 1832 provide that twenty-five per cent. should be allowed upon

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articles of secondary necessity, embracing it, &c. (See Red Book, p. 18.)

"Are these articles of private clothing, and the materials of which such clothing is made, such as are furnished by pursers, articles of secondary necessity? This is a question for the jury to determine. From the evidence, it appears that the articles furnished by the purser are of a finer material than those provided by the government, and have generally been considered in the service as a holiday or shore dress for the seamen. They are not required to purchase them, but do so at their own pleasure. A number of witnesses have been examined, who proved it to have been the custom and usage to charge upon these articles an advance of twenty-five per cent., and that they were considered of secondary necessity. It is true there can be no usage recognized by the courts which is contrary to law. Usage cannot alter the law, but it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those who are within its limits. But it is said a different construction was given to these regulations by Secretary Paulding, and that he confirmed the view and construction of Commodore Claxton.

"If the order of Commodore Claxton had been confined to supplies purchased subsequent to the receipt of this general order, then there might have been force in this argument; but no *change of a usage, even by authority, [*91 can have a retrospective effect, but must be limited to the future."

And in answer to the sixth and fifteenth prayers for instruction, the learned judge charged the jury,—

"It is, however, said, supposing all these doings by Commodore Claxton to have been wrong, still the government is not liable for his acts, and therefore the defendant is not entitled to a set-off in this action, although he may have sustained damages by them. For the purpose of this case, and with a view of obtaining your verdict on the merits of this claim, I state the law to be, that Commodore Claxton was the agent of the government in all this transaction, and although his acts may not have been previously authorized by the government, yet if they were afterwards ratified by the Secretary of the Navy, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders so ratified or confirmed."

In answer to the seventh, eighth, and ninth prayers of the plaintiffs for instruction, the judge charged the jury,—

"Again it is contended, that, supposing all the allegations

on part of the defendant to have been fully made out by the evidence, yet this is not such a claim as can be set off against the demand of the government in this action. However this might be in suits between individuals, the government of the United States does not resort to technicalities to screen it from a just claim by any of its citizens. The act of 3d March, 1797, directs, not only that legal, but that equitable, credits should be allowed to the debtors of the United States by the proper officers of the Treasury Department, and if then disallowed, that they may be given in evidence at the trial; and this whether the credits arise out of the particular transaction for which he was sued, or any distinct or independent transaction, which would constitute a legal or equitable offset or defence, in whole, or in part, of the debt sued for by the United States.

"If, therefore, you believe the defendant has sustained injury by the order of Commodore Claxton, which, according to these principles, was contrary to law in limiting the prices, and which order was subsequently approved by the Secretary of the Navy, having a full knowledge of the facts, you will, from the evidence, ascertain the amount of such loss, and credit the defendant with it as an equitable defence against the claim of the government. In ascertaining this amount, you will recollect that the prohibition of Commodore Claxton as to price applied only to clothing, or materials of which clothing is made, and to no other articles of secondary necessity."

*92] *In answer to the tenth and eleventh prayers of the plaintiffs for instruction, the judge charged the jury,—

"It is incumbent on the defendant to satisfy you of the amount of credit to which he is entitled under this head. In estimating it, you are to allow only the actual loss sustained by him, and not any prospective or anticipated profits which might have been made by the defendant, supposing his whole stock to have been sold at the prices claimed by him.

"If, in consequence of this order, the goods remaining on hand were injured or damaged, he is entitled to recover the amount of such damage; but the jury will determine whether such damage was caused by this order, and whether the sales were lessened in quantities in consequence of the reduction of price. The sales made on shore, and those to other pursers, are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made *bonâ fide*, with a view to reduce an anticipated loss, he will be entitled to be made good his actual loss on such sales."

In answer to the thirteenth and fourteenth prayers of the plaintiffs for instructions to the jury, the judge charged,—

"The second and third items of claim are for commissions on moneys paid by the defendant to mechanics and laborers, when stationed at the navy-yard at Pensacola, from October, 1835, to December, 1837; and a commission on the amount of bills of exchanges drawn by him on the government, from May, 1827, to February, 1830.

"These are alleged to be extra services, for which, by the custom of the department, he is entitled to extra compensation.

"From the rules and regulations of 1818 and 1832, as given in evidence, it appears that both the drawing of bills of exchange by the pursers when abroad, and the payment of mechanics and laborers by them, when stationed at navy-yards, were duties devolved on and usually performed by pursers.

"But if, from the evidence, the jury believe that these duties were required of, and were performed by, the defendant over and above the regular duties of his appointment, and that it has been the practice of the government or Navy Department to allow to pursers compensation on commissions over and above the regular pay, and that the defendant took upon himself the labor and responsibility of such payments and drawing of bills, with an understanding on both sides that he should be compensated for the same as extra services, then it is competent for the jury to allow such sum as they may find to be reasonable and conformable to the general usages of the government in like cases. But the custom and usage which has been *invoked by the defendant in his favor, [*93 must also operate when it is established against him. The usage, to be binding, must be uniform, and be applicable to all officers of the same grade, under similar circumstances. It is not sufficient that one, two, or half a dozen officers have been allowed an extra compensation for such services, unless the rule was a general one, so that each officer performing the service might be supposed to rely on the known practice of the government to allow extra compensation at the time the service is performed. The jury will say, whether the few cases in which extra compensation is proved to have been allowed are not rather exceptions to the general rule of refusing such compensation, than proof of the rule itself.

"My opinion is, that the weight of the evidence is against the claim of the defendant for either of these items."

And thereupon, the counsel for the said plaintiffs did then and there except to the aforesaid charge and opinions of the said judge, on the several points upon which his instructions were prayed for, to the jury. And inasmuch as the charge and opinions, so excepted to, do not appear upon the record, the said counsel for the plaintiffs did then and there tender

this bill of exceptions to the opinion of the said judge, and requested the seal of the said judge should be put to the same, according to the form of the statute in such cases made and provided. And thereupon, the said judge being so requested, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such cases made and provided.

[L. S.] ARCHIBALD RANDALL, *District Judge.*

The jury, under the above instructions of the court, found the following verdict:—

"We, the jury, impanelled in the case of the *United States* v. *McKean Buchanan*, a purser in the navy, find that there is due by the plaintiffs to the defendant the following sums, to wit:—

Commissions on the payment of mechanics and laborers at the navy yard, Pensacola	$2,275 38
Interest on the same	1,024 00
Commissions on drawing bills of exchange	1,626 86
Interest on the same	1,455 00
Loss on sales on board the frigate Constitution	385 52
Loss of commissions	5,277 46
	$12,044 22
Deduct government claim	11,535 50
Due Purser Buchanan	$508 72"

*94] *The counsel for the United States then moved for a new trial, objecting, amongst other things, to the allowance of interest, where no such claim was made by the defendant. Whereupon the counsel for the defendant filed a *remittur* for the two sums of interest, amounting together to the sum of $2,479, and agreeing that a judgment might be entered against him in favor of the United States for $2,148.99.

The court overruled the motion for a new trial, and directed a judgment to be entered accordingly.

By the above bill of exceptions, the case was carried to the Circuit Court, which, on the 9th of November, 1846, affirmed the judgment of the District Court.

The United States brought the case up, by writ of error, to this court.

It was argued by *Mr. Gillet* and *Mr. Johnson* (Attorney-

General), for the United States, and *Mr. G. M. Wharton* and *Mr. Dallas*, for the defendant in error.

The brief filed by the Attorney-General made the following points:—

I. That the court erred in the charge given as to commissions on bills drawn by the defendant, and payments made by him to mechanics and laborers at the navy-yard; because, whether these commissions were to be allowed was a question of law for the court, depending upon the rules and regulations of the navy, which do not warrant them. 1st. By the rules and regulations it was the defendant's duty to perform the services for which the charges were made. 2d. No parol evidence was admissible to the contrary. 3d. And, in fact, there was no evidence from which the jury were at liberty to infer that the services for which the charges were made were extra to those which he was in duty bound to perform under the rules and regulations, or that there was any practice or usage under which he could be paid for the same. 4 How., 80; 2 Wash. C. C., 24; 3 Id., 149; Gilp., 372; 6 Binn. (Pa.), 417.

II. That the court erred in charging the jury that the rules on the subject of pursers' commission on supplies furnished to the crew, established by the Blue Book of 1818, were superseded and repealed by the republication of the rule of 1809, in the Red Book of 1832; whereas the Red Book declares that the rules contained in the Blue Book, except in two particulars mentioned, and others which have been expressly amended, were in full force for the reasons assigned. That the regulations as to pursers' commissions on articles furnished to the crew in the Blue Book are questions of law, and the true construction *of them is, that pursers are entitled [*95
to dispose of slops, and articles of wearing apparel, and of materials of which it is made, at a commission or profit of ten per cent. only. That the regulation of 1809, allowing twenty-five per cent. upon articles of secondary necessity, if it ever included wearing apparel, or materials of which it is made, was superseded and repealed by the regulations of 1818, which directed them to be charged as slops, and was not revived by the republication in 1832. And that the secondary articles mentioned in the regulations of 1809 were defined in the regulations of 1818 to be soap and the other articles enumerated, (wearing apparel, or materials for it, not being among them,) and upon these, by the regulations of 1818, pursers were to be allowed to charge twenty-five per cent.

III. That the court erred in charging the jury that the

unliquidated damages for commissions and losses could be set off in this action at all; and also erred in charging that the United States were liable for them, if incurred by Commodore Claxton; and in stating the law to be, that the Commodore was the agent of the government; and that although his acts may not previously have been recognized, yet, if they were afterwards ratified, with a full knowledge of the facts, as they appear to have been, then the government is responsible for any loss occasioned by his orders, so ratified or confirmed. 9 Pet., 319; 2 Wash., C. C., 131, 161; 13 Wend. (N. Y.), 139, 156, 157; 4 Mason, 482; 5 Id., 425, 439; 10 Pet., 80; 4 Serg. & R. (Pa.), 249; 5 Id., 122; 10 Id., 14; 4 Watts & S. (Pa.), 205, 214.

IV. That there was error in the judge's charge, in answer to the tenth and eleventh prayers;—1st. Because the tenth was not granted when it should have been; and, 2d. Because that part of the charge in which he told the jury that "the sales made on shore and those to other pursers are not such sales as would entitle him to charge the government with the advance of twenty-five per cent. on cost; but if made *bonâ fide*, with a view to avoid an anticipated loss, he will be entitled to be made good his actual loss on such sales," was erroneous, —the United States, under the circumstances, not being liable for such loss, as the jury were, by this instruction, authorized to charge them with.

V. That the court erred in allowing the defendant to turn the verdict in his favor into a verdict against him, by allowing him to remit, without the consent of the United States, and by entering up judgment in their favor without their consent, and contrary thereto. And because the said judgment, even as so corrected, is erroneous, as it includes commissions on drawing *bills and making payments to mechanics and laborers at the navy-yard, and losses on alleged sales on board, and loss of commissions.

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The brief of the counsel for the defendant in error presented the following points:—

1. That at the time when the alleged claim of the government against the defendant, and the alleged credits of the defendant, arose, there was no law of the United States expressly defining the duties or the emoluments of a purser in the navy of the United States; but that the said duties and emoluments were regulated by the rules and regulations of the navy, by orders from the Navy Department, and by usage or custom.

2. That the rules and regulations prepared by the Board of

Navy Commissioners, and published in 1818, called the Blue Book, did not extend to the private stores of the purser, but only to those purchased by the government, and were not the rule regulating the charge of commissions by the defendant on the sale of private clothing, or the materials of which it was made, or of tea, sugar, and tobacco, during the period in which the present controversy originated.

3. That the said rules of 1818, if ever applicable to said subject-matters, were superseded to that extent by the rules of 1832, called the Red Book; and that these latter rules regulated the duties of the defendant and his emoluments, as to the said subject-matters of controversy in this suit.

4. That there is no error in law in the charge of the district judge, nor in the record, upon the subject of the credits claimed by the defendant for commissions on paying mechanics and laborers at the Pensacola navy-yard, and on drawing and negotiating bills of exchange; that the said claims of the defendant depended upon the finding by the jury of certain facts in relation to which evidence had been submitted on both sides, and that the finding of those facts conclusively establishes the right of the defendant to claim said credits.

5. That this court cannot revise the finding by the jury of the facts in controversy, nor grant a new trial, nor reverse the judgment below, except for error in law appearing on the judge's charge, or on the record.

6. That the defendant was entitled to all the emoluments of his office, which, by express or implied contract with the United States, belonged thereto; and that the existing regulations of the naval service, and the existing custom and usage of the navy, defined and formed a contract between the government and the defendant in this respect.

*7. That the defendant properly expended the money [*97
which he received from the United States for that purpose, and with which he is charged in account, and which is sought to be recovered back from him in this suit, in the purchase of the customary private stores; and that he was entitled to sell said stores, in conformity with the rules of the ship, to the officers and crew of the Constitution, at prices regulated by the existing rules and usage of the service; and that he could not lawfully be compelled to sell them at lower rates, nor without a breach of the contract with him.

8. That defendant, as an inferior officer, was by law obliged to submit to the orders of Commodore Claxton in the premises; and that by so submitting he lost none of his rights as purser, but is entitled to assert them in this suit.

9. That the ratification of the said Commodore's conduct in

the premises by the Secretary of the Navy, with a full knowledge of the facts, rendered the United States liable for any loss sustained by the defendant resulting from a breach of contract as aforesaid, and from the orders of said Commodore, so ratified; and that the Secretary had no right to diminish the established rates of profit with respect to stores purchased by defendant prior to such diminution.

10. That, under the evidence in the cause, it was right to submit to the jury, as a question of fact, what were "articles of secondary necessity;" and also to charge them, that, if they were satisfied from the evidence of the existence of a usage to consider clothing, and the materials whereof clothing is made, as such articles, and to charge an advance thereon of twenty-five per cent., such usage was evidence of the construction given to the law, and regulated the rights and duties of those acting within its limits.

11. That there was no error in charging that the defendant was entitled to a credit for the actual loss proved by him to have been sustained in consequence of being compelled to sell his stores at the advance of ten per cent. only, if he were authorized to charge an advance of twenty-five per cent. on the same. Nor in charging that he was entitled to such credit for all actual loss in consequence of the said order of Commodore Claxton.

12. That there is no error in law in the charge of the district judge.

13. That the defendant was entitled to set off all equitable as well as legal credits which he had, and had duly preferred against the United States; and that his claims in this case, if *found by the jury, were equitable credits, which he had a right to set off against the plaintiffs' claim.

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14. That there was no error in allowing the defendant to remit a portion of his credits, as allowed him by the jury; nor in entering the judgment accordingly.

Upon the first point, the counsel for the defendant in error cited the case of *United States v. Tingey*, 5 Pet., 115, 126, and a circular from the Navy Department dated March, 1832.

The pay from the treasury to pursers was regulated by the act of 18th April, 1814, § 1, (3 Stat. at L., 136,) which provided, that "the pay and subsistence of a purser should be forty dollars per month, and two rations per day."

By the act of March 3d, 1835, (4 Stat. at L., 755, 757,) it was provided, that "no allowance shall hereafter be made to any officer in the naval service of the United States, for drawing bills, for receiving or disbursing money, or transacting any business for the government of the United States," &c.

The act of August 26th, 1842, (5 Stat. at L., 535,) introduced a new system with reference to pursers, and provides, section 3, that, "in lieu of the pay, rations, allowances, and other emoluments authorized by the existing laws and regulations, the annual pay of pursers shall be as follows," &c. This act also provided for the purchase of all supplies for the navy to be made with the public money, under regulations to be prescribed by the executive. And pursers are prohibited thereafter from "charging any profit or percentage upon stores or supplies to persons in the naval service, other than those thereinafter prescribed."

The Red Book, p. 18, provides, under the head of "Allowance to Pursers," as follows:—

"§ 1. An allowance of commission of 2½ per cent. upon payments made by pursers is of ancient date.

"§ 2. Pursers are allowed a commission of 5 per cent. on the amount of sales of dead men's clothes. They are also allowed 5 per cent. upon clothing distributed to the crew. January 29, 1803.

"25 per cent. upon articles of secondary necessity, embracing all articles not denominated luxuries, upon which 5 per cent. is not charged. 27 July, 1809.

"50 per cent. upon luxuries, such as tea, coffee, sugar, and tobacco, when furnished either to officers or crew.

"In vessels of 20 guns, an additional allowance is made upon groceries of 5 per cent., and in vessels under 20 guns, of 10 per cent. upon the same articles."

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*Red Book, p. 50:—

"§ 1. Pursers must transmit to the Navy Commissioners a certified invoice of all articles provided by them for vessels bound on a cruise, including all articles procured to be sold for their own benefit. October 20, 1830."

"§ 3. All bills of exchange drawn by pursers on the department must be in favor of and indorsed by the commander of the vessel or squadron. A separate letter of advice must accompany each bill, stating (among other things) the rate of exchange at which the bill is negotiated, &c., &c. August 10, 1824."

Upon the second point, the counsel for the defendant cited numerous passages from the Blue Book, to show the rate of advance which pursers might charge upon what are called "private stores;" but as the court did not decide the point, these references are omitted.

3d point. The counsel contended that the issue of the Red Book, by competent authority, superseded the Blue Book in the matter of the emoluments of pursers. *United States* v.

McDaniel, 7 Pet., 14; Act of Congress of March 2, 1833, for the relief of E. B. Babbit.

Upon the fourth, fifth, sixth, seventh, and tenth points, on defendant's brief, it is submitted, that, if the duties and emoluments of the purser were regulated by no statute, but dependent upon rules and usage, it was the duty of the district judge to submit the question of fact to the jury, what the usage in the matter was, under the evidence presented on both sides; and that he was right in directing them to regulate their verdict in accordance with their view of the usage.

Although there can be no usage recognized by the court which is contrary to law,—and usage cannot alter the law,—yet it is evidence of the construction given to it; and when the usage is established, it regulates the rights and duties of those within its limits. 7 Pet., 14, 15, before cited.

Allowances and emoluments were recognized by statute, as belonging to pursers; and, of course, they were entitled to these, as matter of contract, whenever they rendered the proper service. As specially applicable to the fifth point, the counsel for defendant cited *Henderson* v. *Moore*, 5 Cranch, 11; *Barr* v. *Gratz*, 4 Wheat., 213; *Blunt's Lessee* v. *Smith*, 7 Wheat., 248; *Brown* v. *Clarke*, 4 How., 4; *Zeller* v. *Eckert*, Id., 298.

The jury have found the fact, that the defendant performed these duties upon request, over and above the regular duties of his appointment, that it has been the practice of the government to allow to pursers extra compensation, and that the
*100] defendant *performed these particular services, with an understanding on both sides that he should be compensated for them as extra services. Surely there can be no legal objection, under these circumstances, to the defendant's claim, upon this head.

As to the eighth and ninth points, it is remarked, that the Navy Commissioners' Rules, p. 21, section 10, provide,—"If any officer shall receive an order from his superior, contrary to the general instructions of the Secretary of the Navy, or to any particular order he may have received from the said Secretary of the Navy, or any other superior, he shall represent in writing such contrariety to the superior from whom he shall have received said order; and if, after such representation, the superior shall still insist upon the execution of his order, the officer is to obey him, and to report the circumstances to the commander of the ship, to the commander of the fleet or squadron, or to the Secretary of the Navy, as may be proper."

This mode was strictly pursued by the defendant; and he, of course, lost none of his rights by obeying the law.

Upon the eleventh and twelfth points on defendant's brief, it is submitted, that the defendant received, by the verdict and judgment below, no allowance or equitable credit, except as a compensation for actual loss theretofore sustained by him, in consequence of the erroneous construction of the rules regulating his compensation on the part of the officers of the government. He being entitled, by contract and law, to dispose of the stores, which had been purchased by him prior to any change of existing regulations, at a fixed rate; and having been compelled by his superior officer, (whose orders were subsequently ratified by the government,) to part with them at a less rate,—or, in other words, the credit arising from sales made by him, to which he was entitled as an offset against the money placed in his hands by the government, being illegally diminished by the auditing officers of the United States,—he is at liberty in a suit against him, brought to recover the balance of money in his hands, to assert his rights to the proper rate of profit, and to defalk that from the debit side of his account. The government having deposited in the purser's hands a sum of money, with authority and instructions to buy certain goods therewith, and to dispose of them at fixed rates, cannot, after his purchase and subsequent disposition of these goods, call upon him to refund the money, without an allowance to him of the rates of profit originally agreed upon between them. If, for example, he bought an article, with the government money, for fifty cents, which he was entitled to dispose of for *seventy-five [*101 cents, and the United States subsequently compel him to sell it for sixty-two and a half cents, they cannot, in calling him to account for the money intrusted to him, deny his right to charge them with the difference of twelve and a half cents, which would make up his legal profit on the transaction. They become, in equity, bound themselves to reimburse him for the actual loss of profit accruing from their act. And such was the judge's charge. He instructed the jury to allow "only the actual loss sustained by the defendant, and not any prospective or anticipated profits." *United States* v. *Hawkins*, 10 Pet., 125, shows the manner in which the purser's accounts are adjusted at the treasury.

Upon the thirteenth point, the following authorities are adduced (a part of these authorities are also applicable to the fifth point):—*United States* v. *Ripley*, 7 Pet., 18; *United States* v. *McDaniel*, Id., 1; *United States* v. *Fillebrown*, Id., 28; *United States* v. *Wilkins*, 6 Wheat., 135.

The same general principle as to the right of set-off is laid down in *United States* v. *Robeson*, 9 Pet., 319; *United States* v. *Bank of the Metropolis*, 15 Id., 377.

Mr. Justice WOODBURY delivered the opinion of the court.

This is a writ of error, presenting three distinct grounds of exception to the judgment rendered in the court below.

Neither of these is claimed to justify us in revising the finding of the jury on the evidence, though the verdict was not acceptable in some respects to the district judge who tried the cause, but should have been scrutinized by him, if at all, and, if clearly wrong, submitted to another jury for correction on the motion for a new trial. The exceptions to be now considered, are, therefore, confined to the instructions given to the jury concerning the claims made in set-off by the original defendant, and are, that they all were, in point of law, incorrect.

Those claims were,—

1st. For commissions for drawing bills of exchange.

2d. For commissions on payments made to mechanics and laborers at the navy-yard at Pensacola.

3d. For loss of commissions on sales of slops, and loss by depreciation of property in the Pacific.

The claim for commissions for drawing bills of exchange is founded on such service, performed at times from May, 1827, to February, 1830. But it appears that such commissions were not, at any period, usually allowed to permanent pursers. And though one or two instances were given of such allow-

*102] ances under peculiar circumstances, they were limited *to that number; and on the 10th of November, 1826, commissions to commanders of squadrons, and "officers of any grade," for drawing such bills, were expressly abolished. (Red Book in the Navy, p. 10 and p. 27. See also Letter of 4th Auditor, 26th June, 1844; Circular, 1st April, 1833.)

When the present claim was presented to the department by Mr. Buchanan, in 1831, it was, therefore, rejected, and seems to have been abandoned by him for nearly ten years after, when, another difficulty arising as to other transactions of his in the Pacific, this claim was revived, and offered in set-off to a suit by the government for moneys then recently advanced to him.

On what ground, then, could the district judge properly leave its allowance to the jury, as he did at the trial in this case? It seems to us, that he should have instructed them that, in point of law, neither any act of Congress, nor any regulation of the department, justified the allowance; that

the service performed was an ordinary one, connected with a purser's official duties, and consequently, for which, in point of law, he was entitled to no extra compensation by way of commissions or otherwise. (See *Gratiot* v. *United States*, 4 How., 112.)

The two cases, often relied on to justify such an allowance, were both claims for what was deemed by the court extra service. (*United States* v. *McDaniel*, and *United States* v. *Fillebrown*, 7 Pet., 16 and 28.)

On the subject of a usage or custom, attempted to be proved, to overturn these principles and decisions, it seems to us that the judge should have ruled, that a usage ought not to be permitted to be set up, where a rule, as here, is not doubtful, but settled. (*Brown* v. *Jackson*, 2 Wash. C. C., 24; 6 Binn. (Pa.), 417.) And that a usage or custom, when admissible, must, in order to be valid, be ancient, reasonable, and generally known (3 Wash. C. C., 149), and also be certain (*United States* v. *Duval*, Gilp., 372). Consequently, when it appeared here that the compensation was fixed or clear, and when it appeared that only one, or at the furthest, two extra allowances could be proved of commissions for such services by permanent pursers, and those under peculiar circumstances, he should have directed that, in point of law, these last did not constitute a valid usage or custom, and that there was nothing properly to be left to the jury on the subject. In the *United States* v. *McDaniel*, 7 Pet., 16, the usage had existed uninterruptedly for fifteen years.

There is a very good description of a custom or usage in ch. 1, art. 3, of the Civil Code of Louisiana:—"Customs result *from a long series of actions, constantly [*103 repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent." How imperfectly the evidence in the present case meets the requirements of such a definition as this, or of any legal view of a valid usage, is so obvious as not to need further explanation.

The second claim, for paying mechanics and laborers at the navy-yard at Pensacola, from 1835 to 1837, stands in a similar condition. It was a service expressly imposed on a purser of a yard as official, by the Blue Book of the navy, as early as 1818 (p. 14).

But the judge instructed the jury, that this book had ceased to be in force. In this he erred. For the navy department, in 1831, had expressly and officially published, that it was still "in full force," except in two or three other particulars, specified in a note to the Red Book (p. 49, note). The lat-

ter, also, was then first printed, and not only did not profess to repeal the former, but such was not its legal effect. The Blue Book related chiefly to other matters than what were in the Red Book, and which were as necessarily to remain regulated by the former after the publication of the latter as before, and even now as then.

The Blue Book concerns the complement of officers and men for vessels of different sizes, the duties of those officers on shipboard and at yards, salutes, recruiting, &c.; and not, like the Red Book, relating to decisions in the civil administration of the department, and circulars, orders, &c., connected with it.

The latter was a mere collection of these latter matters, before existing dispersed and in manuscript; and being compiled and printed for the benefit of navy officers, as well as the department, the date of each decision and circular was given, so that officers might see, if decisions, regulations, or circulars conflicted in any degree, as they sometimes might, which was of most recent date, and consequently often modifying or superseding one made earlier. The Red Book introduced nothing new into the service, nor professed to do it, but merely arranged and made more generally known by printing, in 1831, what had before taken place on the matters described in it, as had been done in relation to some matters in the Blue Book, by printing and distributing that in 1818, as well as compiling and publishing in that other things new and permanently useful.

There being, then, no repeal of this part of the Blue Book relating to the duties of pursers at yards, the payment of *mechanics and laborers stood, as ever since 1818, if not longer, an official duty of pursers stationed at them.

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The idea of attempting to set up a usage to pay commissions for this service, and leave merely one case of the kind to the jury as evidence of such a usage, was altogether untenable on sound principles, as before shown under the first claim. All the other cases referred to in support of such a usage or custom were not cases to allow commissions, though sometimes to sanction a sum of money for a clerk.

But even this last had been abolished as early as 1826, long before the service performed by the original defendant, and only an additional steward had been since allowed at yards where the workmen were numerous. (Red Book, 52. See Letter of 4th Auditor, June 26, 1844, and Circular of 1st April, 1833.)

There is, likewise, another defect in the instructions to the jury on both of these points, in permitting the testimony of

naval officers, and sometimes of subordinate ones, rather than the head of the department, to go to the jury to enable them to decide what were and were not official duties, when it was rather the province of the court, after being duly informed from proper sources, to settle that as a question of law, and direct the jury upon it. (4 How., 80; 6 Binn. (Pa.), 417.)

The third ground of claim, and the instructions upon it, are in some respects different, and remain to be considered.

This claim was for commissions lost on the sale of slops and for depreciation in property, caused by orders of Commodore Claxton in the Pacific in 1839.

The latter, finding that an unusual quantity of some kinds of clothing had been issued by the defendant from his private stores, on which an advance of twenty-five per cent. had been charged, and only a small quantity from the public stores, on which only ten per cent. advance was charged, interposed and issued an order against taxing the crew over ten per cent. advance on certain articles of wearing apparel, on which the defendant insisted he was entitled to twenty-five. This claim is for a loss of the difference between ten and twenty-five per cent. on what was and might have been sold, and loss by depreciation on articles not sold. Considering the views entertained by this court on the impropriety in law of allowing this claim to be put in at all in set-off to this action, it is not necessary to decide here which percentage was the proper one.

On the one hand, the opinion of the Commodore was sustained by that of Mr. Paulding, then Secretary of the Navy, —presumed to be best acquainted with the previous constructions *in the navy department,—and by the express language of the Blue Book (pp. 103 and 105), and by [*105 some early decisions published in the Red Book (p. 18), as well as by the views of some of the members of this Court; yet other constructions of these decisions tend to sustain the claim, as do the views of other members of this court.

Whichever of these constructions, then, may be correct, is not now settled, because we think it clear, that such a claim as this is not allowable at all by way of set-off to an action brought by the government.

The statute of March 3d, 1797, which allows set-offs, has had a very liberal construction by this court, extending it to matters even distinct from the cause of action, if only such as the defendant is entitled to a credit on, whether equitable or legal. (*United States* v. *Wilkins*, 6 Wheat., 135; *Ripley* v. *United States*, 7 Pet., 25.)

The object is to settle between the parties their mutual accounts or debts. (See the Act of Congress.)

But any wrongs or torts done, and any unliquidated damages claimed, have never been permitted as a set-off. (*Butts* v. *Collins*, 13 Wend. (N. Y.), 156; *McDonald* v. *Neilson*, 2 Cow. (N. Y.), 140; *Heck* v. *Sheener*, 4 Serg. & R. (Pa.), 249; 10 Id., 14.) This rule prevails when the United States are plaintiffs, as well as individuals. (*United States* v. *Robeson*, 9 Pet., 325.)

Much less could wrongs done by others than the United States, and for whom it would be a very grave question whether the United States were in law responsible, be set off, and unliquidated damages allowed.

Such a transaction, whether sounding *ex delicto* or *ex contractu*, seems to be one between the two officers, rather than between one of them and the government. (*United States* v. *Hawkins*, 10 Pet., 134; 9 Id., 319.)

It is certain, that no action could technically be sustained against the United States for any wrong done here by Commodore Claxton. And, waiving their sovereignty to bar a suit, it is quite manifest that no claim exists as a matter of course against the government for a wrong done by one officer against another officer, or by one officer against an individual, when the liability of the officer himself for public acts is often questionable; and when the liability of the government for his acts, private or public, is still more in doubt. (*Garland* v. *Davis*, 4 How., 148, and cases there cited; Story on Agency, 412, *n.*; *Duncan* v. *Findlater*, 6 Cl. & F., 903, 910.)

*106] Nor does it alter the case, if another officer, *like a secretary of the navy, approves of the wrong. Should a post-captain go out of the path of his duty, or act beyond his legitimate authority, it appears on its face an affair between him and the sufferer, and not between the latter and the government.

The defendant, if he has really been wronged by Commodore Claxton, acting against and beyond his official authority, has not only the usual modes of redress against him in the judicial tribunals, (*Jones* v. *Bird*, 5 Barn. & Ald., 837; 15 East, 384,) but it is gratifying to reflect, that resort to Congress is also open for relief, and with success, undoubtedly, should the defendant be able to satisfy Congress he was wronged by the Commodore, and that it is just and proper for the government to atone for any injury so done to him by another.

But some legislative sanction to this claim, or some recognition by Congress of a right to it, would seem an indispensable

preliminary to its allowance in any form in the judicial tribunals against the government. See *United States* v. *McDaniel*, 7 Pet., 2 and 16.

Judge Story in his work on Agents (§ 319) says:—"In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasance, or wrongs, or neglects or omissions of duty, of the subordinate officers or agents employed in the public service."

This view is sustained by several adjudged cases, among which are the *United States* v. *Kirkpatrick*, 9 Wheat., 720, and 8 Wend. (N. Y.), 403; *United States* v. *Vanzandt*, 11 Wheat., 190; 1 Pet., 318; 5 Mason, 441; 15 East, 393; 6 Cl. & F., 903.

Consequently the judge in the District Court erred in law by permitting a set-off, composed of such a claim, to go to the jury at all. There being error in the instructions on all the three claims, and the judgment in the Circuit Court having affirmed that in the District Court, it must be reversed and one entered disaffirming it, and the case remanded thence to the District Court, in order that there may be a *venire de novo* in that court, and another trial had in conformity to these views.

Mr. Justice McLEAN and Mr. Justice GRIER dissented from the above opinion.

Mr. Justice WAYNE did not sit in the cause.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the *Eastern District of Pensylvania, and was argued [*107 by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to enter a disaffirmance of the judgment of the District Court, and to remand this cause to the said District Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.