Neither the answer of the party, nor the argument of counsel, allege any good reason, why a married woman should be permitted to take property without paying for it, more than another. The disabilities thrown round her by the law, are for her protection—not to enable her to commit fraud.

Decree affirmed, with costs.

CURTIS'S ADMINISTRATRIX *vs.* FIEDLER.

1. An importer from whom a collector exacted illegal duties could not under the Act of 1839, maintain assumpsit to recover back the excess, unless the suit was brought before the officer paid the money into the treasury.
2. The Act of 1845 gave the right of recovering back, such excessive duties to all importers who had paid or might thereafter pay them, under protest in writing, with the grounds of objection distinctly set forth.
3. Whether this latter act, has a retroactive operation, so as to include the case of a person, from whom excessive duties were exacted before its passage. *Quere?*
4. But it is certain, that a party whose claim for excessive duties is not recoverable under the Act of 1839, and who seeks to recover under the Act of 1845, cannot avail himself of the latter statute, without bringing himself within its terms, by showing that he made proper protest at the time of payment.
5. A party imported iron and hemp at the same time, entered them together, and made a general protest against the duties charged in the entry, without discrimination of the packages and stating no ground of objection, except that the charge was illegal. *Held*, That such a protest utterly fails to meet the requirements of the Act of 1845.
6. The importer must indicate by his protest, the distinct and definite ground of his objection to the charge, and show his intention to reclaim the excess.
7. This distinctness is required, that the officers may know to what amount of risk and responsibility they expose the Government by taking the duties in the face of the objection.

Error to the Circuit Court of United States for the Southern District of New York.

Ernest Fiedler, a merchant of New York, in September, 1842, imported into the port of New York, from St. Petersburgh, Russia, in the ship "Nicholas Savin," a quantity of unmanufactured hemp. He also imported at the same time, by the same vessel, a quantity of iron in bars.

The Tariff Act of August 30, 1842, which was in operation at the time of the importation, contained the following provision in respect to the duty to be levied on hemp: "On manufactured hemp *forty* dollars per ton; on manilla, sunn, and other hemps of India, on jute sisal, grass, coir, and other vegetable substances, not enumerated, used for cordage, *twenty-five* dollars per ton." *Tariff Act of* 1842, sec. 3, sub. 3.

Edward Curtis, at that time Collector of the Port of New York, treated this hemp as unmanufactured hemp and charged upon it a duty of $2,575.38, being at the rate of $40 per ton. The duties thus charged upon the iron amounted to the further sum of $848.56. The importer protested against the payment of the duties thus charged on the entire importation. The protest was in writing upon the margin of the entry, which embraced both the hemp and the iron, and was as follows: "*I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty. Sept.* 1, 1842." No other protest against or objection to the payment of the duties was made by or on behalf of the plaintiff. The duties were paid to the collector, *September* 6, 1842, and by him paid into the Treasury of the United States.

The plaintiff afterwards, in November, 1847, brought the action of *assumpsit* to recover the difference between the amount of duties charged and paid on the hemp specified in the entry at the rate of $40 per ton and the amount calculated at the rate of $25 per ton, the difference claimed being $965.77. The defendant pleaded *non assumpsit.*

At the trial, before Mr. Justice Nelson and a jury, the above facts were proved, and the plaintiff claimed that under articles 6 and 11 of the Treaty between the United States and Russia, of

December 6th and 18th, 1832, the exaction of any duty on the hemp in question beyond $25 per ton was unauthorized and illegal. The Articles of the Treaty thus relied on, are as follows: "*Article* 6. No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States, than are, or shall be payable on the like article, being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation or exportation of any article, the produce or manufacture of the United States or of Russia, to or from the ports of the United States, or to or from the ports of the Russian Empire, which shall not equally extend to all other nations."

"*Article* 11. If either party shall, hereafter, grant to any other nation, any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional."

The plaintiff grounded his right to recover on this: that the Treaty with Russia fixed the duties on hemp imported from that country at the rates imposed on the same articles from any other country, and inasmuch as the tariff of 1842 imposed only $25 per ton on India hemp, no higher duty could be legally charged on Russian hemp.

The plaintiff called witnesses to prove that Russian and Manilla hemps are known in trade and commerce as "hemp," and serve substantially the same purposes, being all used in the manufacture of cordage, &c. On the part of defendant it was proved and admitted by plaintiff's counsel, that all the hemps of India are the products, not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees.

The defendant asked the Court to instruct the jury as follows:

First. That the present action of assumpsit cannot be maintained inasmuch as by the 2d section of the General Appropria-

tion Act of the 3d of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required to pay, and did pay, such moneys into the Treasury of the United States, and that the Act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, *retroactively*, to subject defendant in his individual capacity to such action.

Secondly. That the present action cannot be maintained, inasmuch as defendant acted in precise conformity to the Tariff Act of August 30th, 1842, by which a duty of $40 per ton was laid on all manufactured hemps (except the hemps of India); that as between the defendant as collector and plaintiff as importer, the amount of duties to be paid was conclusively fixed by the said Act of Congress. That the question whether or not the discrimination made by the said Act of August 30th, 1842, between the hemps of India and other unmanufactured hemp, was, in respect to Russian hemp, an infraction of the treaty previously made with Russia, was exclusively a question to be discussed and settled by and between the Government of Russia and the Government of the United States, and that in a private action between the importer and the defendant, it was not competent for the plaintiff to raise, nor for the judicial tribunals to decide, any such question.

Thirdly. That the present action could not be maintained because the protest of the plaintiff, dated September 1st, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question, nor did it discriminate between the duties so charged on such hemp and the duties charged on the iron included in the entry; but, on the contrary, the said protest referred to all the duties charged in the said entry—those charged on the iron equally with those charged on the hemp, and placed the objection to the payment thereof on the ground that there was no law authorizing their exaction.

Fourthly. That upon the true construction of the Tariff Act of the 30th of August, 1842, all hemps, wherever produced, and

even though produced in India, which are the products of the *cannabis sativa,* are charged with a duty of $40 per ton, and the lesser duty of $25 per ton is limited to hemps not the products of *cannabis sativa,* but of other and different plants or trees; and that therefore the discrimination made in favor of such hemps of India was not an infraction of the Treaty with Russia.

The Court refused to give the instructions so requested by the defendant, but directed the jury, that if they found from the evidence that the hemps of India were, at the time of the passage of the Tariff Act of 1842, generally known in trade and commerce as unmanufactured hemps, the plaintiff was entitled to a verdict for the amount claimed by him; and in accordance with that view the verdict was rendered and judgment given. The defendant took this writ of error.

Mr. Butler, of New York, and *Mr. Coffey,* of Pennsylvania, for Plaintiff in Error.

These actions of *assumpsit* cannot be maintained, even were it admitted that the moneys sought to be recovered were illegally exacted by the defendants as duties on the hemp in question.

1. When such moneys were received by the defendants, they were bound by the Act of 3d March, 1839, to pay them into the treasury, and did so pay them; and if liable to any action for the recovery thereof, they were not liable to an action of assumpsit for that purpose. 5 U. S. Statutes at Large, 348, sec. 2; *Cary* vs. *Curtis,* (3 Howard, 236).

2. The Act of the 26th of February, 1845, (5 U. S. Statutes at Large, 727,) should not be construed to operate, and cannot operate *retroactively,* to subject the defendants in their individual capacity to an action to which they were not before liable.

But if it be conceded that the Act of the 26th of February, 1845, (5 Stat., 727,) restores the right of persons who have paid money to collectors for duties under protest, to bring suit against the collectors to test the legality of such payments, which right had been taken away by the Act of 3d March, 1839, (5 Stat., 348, sec. 2,) and the ruling of the Supreme Court in *Cary* vs. *Curtis,* (3 How., 236,) a fatal objection to these actions still

exists. In restoring this right of action, the Act of 1845 subjected it to this condition: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It is now said by the defendant in error, in *Curtis* vs. *Fiedler*, that this law was not in existence when the duties in that case were paid, and that, therefore, it cannot have a retroactive effect to require the protest to conform to its terms. But the plain and perfect answer to this objection is, that by virtue of the Act of 3d March, 1839, the defendant in error had no right of action at all against the collector at the time he paid the duties and made his protest, in September, 1842. The opinion of the Court in *Cary* vs. *Curtis* established the validity of that act, and showed that it utterly destroyed the right to recover in assumpsit against the collector for duties paid under protest, (the form of remedy adopted in this case.) His right of action was therefore entirely created by the retroactive operation of the Act of 26th February, 1845, which declared that nothing in the Act of 1839 should be construed to take away or impair the right of any person or persons *who have paid*, or shall hereafter pay money for duties under protest to any collector, &c., to maintain any action at law against such collector, &c. And in the same section is contained the clause above quoted, declaring that *no action* shall be maintained, &c. unless the said protest *was* made in writing. Surely the condition which is thus appended to the right of action is as operative as the clause which confers that right. The right depends on compliance with the condition; and if the protest of the defendant in error did not happen to conform to the requirements of the condition, then no right of action was given to him. If he has any remedy at all, it is that provided by the Act of 1845, and that was given him only on condition that his protest was made in accordance with its terms. He cannot invoke the retroactive remedy, and discard the retroactive condition on which it is given.

If, therefore, the protest made by the defendant in error, when he paid the duties, was not in substantial accordance with the terms of the Act of 1845, the Court below erred in overruling the third point of the plaintiff in error, and in allowing the action to be maintained.

The custom-house entry of merchandise, on which the protest was written, embraces a charge for 1,835 bars of iron, hammered, and for 50 and 15 bundles of hemp, no discrimination being made as to the class of duties protested against.

The ground of objection to the payment of the duties upon which this action is attempted to be sustained, is, that as the treaty with Russia of December, 1818, stipulates that no higher rate of duties shall be imposed on goods imported from Russia than on like articles imported from other places, the duty rate of $40 per ton imposed by the Tariff Act of August 30, 1842, on unmanufactured hemp, should not have been charged on the hemp imported by the plaintiff, Fiedler, and described in the entry of the 1st of September, 1842, but the duty rate of $25 per ton, imposed by the same Tariff Act on manilla, sunn, and other hemps of India, &c., should have been charged on it, and that the plaintiff has a right to avail himself in this action of that provision of the Russian treaty, to recover the amount of duties thus illegally paid.

It is contended that under the protest filed, it was not competent for the plaintiff below to raise this question, and that the Court below erred in overruling the third point of the defendant below, and in entering judgment for the plaintiff.

The requisites of the protest prescribed by the Act of 26th February, 1845, as above cited, as a condition of the maintenance of an action against a collector to recover duties paid under such protest, are, that the protest shall be "made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

The object of Congress in requiring not only the objection, but the *grounds* of objection, to be distinctly and specifically set forth, has been fully explained by the Courts of the United

States; and the numerous cases in which the sufficiency of pro tests under this Act have been examined by the Judges of this Court, show beyond question that the protest in this case is fatally defective.

Mason vs. *Kane,* Maryland Circuit Court, April Term, 1851, cited 2 Blatchford C. C. R., 390); *Warren* vs. *Peaslee,* (2 Curt. C C. R., 235); *Kriesler* vs. *Morton,* (1 Curt. C. C. R., 413); *Norcross* vs. *Greely,* (1 Curt. C. C. R., 114); *Swanston* vs. *Morton,* (1 Curt. C. C. R., 294); *Burgess* vs. *Converse,* (2 Curt. C. C. R., 294); Same case, (18 How., 413); *Thompson* vs. *Maxwell,* (2 Blatch. C. C. R., 385); *Pierson* vs. *Lawrence,* (2 Blatch. C. C. R., 495); *Pierson* vs *Maxwell,* (2 Blatch. C. C. R., 507); *Focke* vs. *Lawrence,* (2 Blatch C. C. R., 508); *Cornett* vs. *Lawrence,* (2 Blatch. C. C. R., 512) *Wilson* vs. *Lawrence,* (2 Blatch. C. C. R., 514); *Tucker* vs. *Max well,* (2 Blatch. C. C. R., 517).

Tested by the rules applied in these cases, the protest filed by Fiedler is insufficient to maintain this action. The only objec tion set forth is that "there exists no law authorizing the exac tion of said duty."

The entry on which the protest is written contains a charge for duty on hammered bars of iron, and charges on bundles of hemp. The protest fails to state whether the objection to the payment of duties applies to that charged on the iron, or to that charged on the hemp, or to both. It is said in *Warren* vs. *Peaslee,* (2 Curt. C. C. R., 235,) that "the grounds of the objection to the particular payment sought to be recovered back, must be, not only distinctly, but specifically set forth, and that it must be applied to that particular payment." It is impossible that the collector could learn from this protest what particular payment of the duties charged on the entry was objected to, whether to that charged on all or on a part of the entries enumerated. It is true that the protest is broad enough to cover all, and it is true as the plaintiff's counsel argue, "that the whole includes a part." But it is precisely that vague generality which the act meant to prohibit. The protest, as is said in *Thompson* vs. *Maxwell,* must, "by positive and direct notice, point out every particular of fact and law;" and as is said in *Swanson* vs. *Morton,* "must show

distinctly *what* is objected to." If the object of the law be to give notice to the collector of the specific objection, so that, if possible, he may remove its cause, and also to confine the protestant on the trial, to the ground of objection set forth in his protest, then this protest fails in both particulars, for it does not inform the collector *where* the illegality is, and, of course, is not in such form as to limit the importer, on the trial, to any specific ground, since he may then apply his objection either to the charges on the iron, or to the charges on the hemp, at his pleasure.

The protest is also defective in this, that it covers the *whole* duty and not the excess on the hemp, of which complaint is now made. The duty charged on the hemp it $40 per ton, and the plaintiff below admits that $25 per ton was legally due, and yet his protest "against the payment of the duty charged in this entry," instead of informing the collector that the objection was to the payment of the duty in excess of $25 per ton, gave him notice in effect that the objection was to the payment of any duty. It should have specified the part of the duty against which he now objects, viz.: the difference between $25 per ton and $40 per ton on the hemp. The objection taken in the Court below to the payment of this part of the duty is, therefore, in this respect substantially different from that taken in the protest.

The protest is especially defective in this, that it sets forth no *ground* of objection at all. The objection that "no law exists to authorize the exaction of the duty," gives no distinct or specific information, or rather no information whatever of the ground on which the payment of the duties is opposed, It is a form in which any objection to the payment of duties may be clothed, since in every case the ground of recovering duties paid must be, that no law authorized their exaction. It is broad enough to afford a cover for any question that may be raised to the validity of the tariff laws, or the regularity of the proceedings of the custom-house officers; and neither furnishes the collector with knowledge of the alleged wrong, so that, if possible, he may remedy it; nor with the means of restraining the protestant from

selecting, on the trial, any particular ground of objection which subsequent information or reflection may suggest. On such a protest the collector is necessarily ignorant of the wrong complained of, and of the issue which he is to meet on the trial. To sustain this protest would, it is suggested, be to abrogate the statute and overrule all the cases that have been cited.

Mr. Cushing, of Massachusetts, and *Mr. Gillet*, of the District of Columbia, contra.

The Act of March 3d, 1839, requiring collectors receiving money under protest, to pay the same into the Treasury, does not bar the right of recovery in this case.

On the trial, the defendant requested the Court to charge that the action could not be maintained, "inasmuch as, by the 2d section of the General Appropriation Act of March, 1839, which was in force at the time of the receipt of said moneys by the defendant, he was required, and did pay such moneys into the Treasury of the United States, and that the Act of Congress of the 26th of February, 1845, cannot operate, nor should it be construed to operate, retrospectively, to subject said defendant in his individual capacity to such action." The Judge refused to give this instruction, and the defendant excepted. (R., p. 14.)

This presents the question, whether the Act of 1839, deprived the plaintiff of his right of action, and continued to do so.

The provision referred to will be found in 5 U. S. L., 348, § 2.

In the case of *Cary* vs. *Curtis*, (3 H., 236), it was held that the provision cited above, protected the collectors from prosecution in cases where they had exacted an excess of duties, and paid the same into the Treasury. Congress being in session when this decision was made, the Act of February 26th, 1845, (5 U. S. L., 727), was passed to remove the obstacle in the way of recovering in such cases, where the importer had been wronged. The Act provided: "that nothing contained in the 2d section of the Act of 1839 shall take away, or be construed to take away, or impair, the right of any person or persons who *have paid* or *shall hereafter pay* money, as and for duties under protest, to any collector of the customs, or other persons acting as such, in order

to obtain goods, wares, or merchandise imported by him or them, or on his or their account, which duties are not authorized, or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law; nor shall anything contained in the 2d Section of the Act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

Although the Act of 1839 was held to prevent a recovery, the above Act of 1845 removed the obstacle, and was designed to permit suits for previous exactions. Had not this been so, those previously paying excess of duties would have been remediless because this Act of 1845 prohibits refunding by the Secretary under the Act of 1839. The object of the Act was not to deprive the party of a remedy, but to confer one in entire harmony with the provision of the Constitution in relation to jury trials. Although at the time of this transaction the plaintiff was prohibited from suing, the prohibition was removed, and it became lawful in 1845.

The protest served was sufficient in form, and the collector was bound to take notice of the law protecting the rights of the importer, without its being specified in the protest.

On the trial, the defendant's counsel requested the Court to charge, "that the present action could not be maintained, because the protest of the plaintiff, dated September 1, 1842, did not refer to the treaty with Russia, nor set forth distinctly and specifically any ground of objection to the payment of the moneys, or any part thereof, charged by the defendant for duties on the hemp in question; nor did it discriminate between the duties so charged

on such hemp, and the duties charged on the order included in the entry, to which said protest was attached; but, on the contrary, the said protest referred to the duties charged in the said entry—those charged on the iron, equally with those charged on the hemp—placed the objection to the payment thereof on the ground that there was no law authorizing their exaction." The Judge refused to give this instruction, and exception was taken.

At the time of paying the excess of duties now claimed, the plaintiff made a protest in writing, broad enough to cover his case, which was endorsed on the entry in these words: "I hereby protest against the payment of the duty charged in this entry, on account that there exists no law authorizing the exaction of said duty."

The defendant now seeks to escape liability, upon the ground that the duties on the iron, and a portion of those charged on the hemp, were authorized by law. His theory is, that the whole does not include a part. Until he demonstrates this, the common axiom must be respected which establishes the opposite conclusion. The protest, although broad enough to cover the duty on the iron, the plaintiff did not seek to apply to that article. To that extent there is no fact proved in the case to which it is applicable.

But as to the hemp on which the defendant charged forty per cent., the protest does apply. The plaintiff claimed that there was no law authorizing that duty. If he was bound to specify the objection, he did so most fully.

But prior to 1845, there was no law requiring the protest to be made in writing, or to specify the objections. The necessity of written protests and specific objections led to the provision in the Act of that date, (5 U. S. L., 727,) which provides:

"Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of the said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." This was the first law which required the protest to be in

writing, and to specify the particular objection to the payment required.

But this Act cannot be construed to have a retroactive effect, so as to deprive a claimant of a lawful right existing at the time of its passage. The right of the claimant became fixed before the act passed, and he was legally entitled to have his money refunded.

The Act of 1839 was the only obstacle in the way of recovery, and that was removed. To hold that the Act of 1845 required a protest in writing, and of a special character, which was not requisite when the excess of duties was demanded, and could not then be supplied, while it repelled the power of the Secretary of the Treasury to give relief, would be to declare that the claimant was deprived of all possible remedy, when the avowed object of the Act was to confer one of a popular character. Congress had no power thus to devote private property to public use, and deprive the party of all possible means of indemnity. Such was not the intention of Congress, and no such construction can be put upon the Act.

But even under this provision of the Act of 1845, the protest was sufficient. It was made in writing and at the time of paying the duties. It states that there was no law authorizing the collector to demand duties at the rate upon which he insisted—that is, $40 per ton. The question was upon that high rate. The collector demanded it, and the importer objected to paying it. The Act of 1845 did not require the importer to state how much he thought the law authorized the collector to demand. He resisted the exaction of $40 per ton, and the collector insisted upon it, and that was the matter in dispute, and the protest was prepared to meet it.

There was no question of fact involved, to which the importer was bound to call the collecton's attention, so that he might examine it and determine it. The question was one of law—to wit: what was the lawful duty upon the hemps of India? The collector was bound to know the law, whether found in the Constitution, a treaty, or statute. He did not need to have his attention specially called to the law. He decided it by declaring

as a matter of law, that the hemps of India were not hemps under the law, and therefore, that the hemps of Russia were not entitled to admission at the rates established for hemps of India; or, he may have decided that the act of Congress repealed or nullified the provision of the treaty. In either event the protest was sufficient. The objection is too technical to be permitted to deprive the party of a legal right which has been conceded to others where no such formalities as a protest are shown.

If the protest required by the Act of 1845 includes and extends to those previously made, it is confidently insisted that the one in question was sufficient.

Mr. Justice CLIFFORD. This is a writ of error to the Circuit Court of the United States for the Southern District of New York. According to the transcript, the suit was commenced by the present defendant against Edward Curtis, in the Superior Court of the City of New York, to recover back an alleged excess of duties paid by the plaintiff upon certain goods and merchandize imported into the Port of New York during the period that the defendant in the Court below was the Collector of the Customs of that port Date of the writ does not appear, nor is it of any importance in this investigation, as the record of the suit was on the 1st day of February, 1847, duly transferred under the 3d section of the Act of the 2d of March, 1833 into the Circuit Court of the United States, where all the proceedings in the suit took place, which are now the subject of revision. 4 Stat. at Large, p. 633. Suit was upon promises, and the declaration contained the common counts as in *indebitatus assumpsit.* Subsequently to the transfer of the record, the defendant, then in full life, appeared and pleaded that he never promised in manner and form as the plaintiff had alleged against him, and upon that issue the parties at the April Term, 1849, went to trial. To maintain the issue on his part, the plaintiff produced and gave in evidence an original entry made by him at the custom-house in the Port of New York on the 1st day of September, 1842, of certain goods and merchandize imported into that port from St. Petersburg, in Russia, in the Russian ship

Nicholay Savin, and which goods and merchandize were duly consigned to the plaintiff by the shipper and owner. Three packages were specified in the entry, of which two consisted of hemp in bundles, and the other of iron in bars, hammered. As described in the entry, one of the packages of hemp contained fifty bundles and the other fifteen. and the package of iron contained eighteen hundred and thirty-five bars.

Unmanufactured hemp by the Act of the 30th of August, 1842, was subject to a duty of $40 per ton, but manilla, sunn, and other hemps of India were subject to a duty of only $25 per ton. These provisions of the Tariff Act under consideration are plain and clear, and by reference to the 4th section of the act it will be seen that iron in bars or bolts, not manufactured in whole or in part, was subject to a duty of $17 per ton. 5 Stat. at Large, pp. 550, 551.

Parties admitted at the trial that the defendant was the Collector of the Port of New York at the time the entry was made, and that he, as such collector, pursuant to the instructions of the Department, charged on the hemp included in the entry a duty of $40 per ton, under the before-mentioned Act of Congress. They also admitted that the duties on the hemp as charged by the collector amounted to $2,575.38, and that the duties charged at the same time on the iron included in the entry amounted to $848.56, making an aggregate charge for duties on the whole importation of $3,423.94. Demand of that amount as the proper charge for the duties on the importation was made by the defendant on the day of the entry, and the plaintiff on the same day protested against the payment of the same in writing, as appears on the margin of the entry in the words following, to wit: "I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty." But the whole sum, notwithstanding the protest, was exacted by the defendant, and the plaintiff accordingly, on the 6th day of the same month, paid the amount charged, and on the same day the defendant paid the same into the Treasury of the United States. Plaintiff insisted at the trial that by virtue of the 6th and 7th articles of

the Treaty between the United States and Russia the hemp included in the entry could only be charged with the same duty as that imposed in the Tariff Act on the hemps of India, because the articles of the treaty referred to stipulate in effect that no higher duty shall be imposed on the produce of Russia imported here than is imposed on the like articles of produce imported from the most favored nations. 8 Stat. at Large, 446.

Evidence was accordingly introduced by the plaintiff tending to show that both the Russian hemp and the hemps of India are known in trade and commerce as hemp, and that both are used in the manufacture of cordage, and serve substantially the same purposes. On the other hand, the defendant proved, or it was admitted, that all the hemps of India are the products not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees, and upon the exhibition of the foregoing proofs both parties rested.

Defendant controverted the position assumed by the plaintiff that the rate of duty could not exceed that imposed by law on the hemps of India, and also insisted that the action could not be maintained against him because the protest of the plaintiff did not set forth any distinct and specific ground of objection to the payment of the duties charged on the hemp, and certainly did not set forth distinctly and specifically any such ground of objection to the payment of the same as that assumed by the plaintiff, or in any manner discriminate between the duties charged on the hemp and the duties charged on the iron included in the same entry, but placed the objection to the payment of the moneys solely on the general ground that there was no law authorizing the exaction.

Prayers for instructions were presented by the defendant, affirming that the hemp was legally chargeable with a duty of $40 per ton, and also embodying the substance of the foregoing objections to the right of the plaintiff to maintain the action, but the presiding justice concurring with the plaintiff upon the merits, refused the requests, and, among other things, instructed the jury that the action might be maintained, although it was an action of assumpsit for the recovery of moneys received by

the defendant for duties paid under protest while the Act of the 3d of March, 1839, was in force, and before the Act of the 26th of February, 1845, was passed, and that the protest in writing of the plaintiff was sufficiently precise and distinct to enable the plaintiff to recover back any portion of the moneys paid for duties on the hemp included in the entry which should appear to have been illegally exacted. Under the instructions of the Court the jury returned their verdict in favor of the plaintiff, and the defendant excepted to the refusal of the Court to instruct the jury as requested and to the instructions given. Judgment was deferred in consequence of a motion for new trial and other proceedings, which need not be noticed until the 17th day of December, 1860, and in the meantime the defendant died, and the administratrix of his estate was admitted to defend.

Three questions arise on this state of the case for the consideration of the Court. First, whether, under the second section of the Act of the 3d of March, 1839, an action of assumpsit on an implied promise can be maintained against a collector of the customs to recover back duties exacted by him in his official capacity after he had received the moneys and paid the same into the Treasury of the United States and if not, then secondly, whether the objection taken at the trial to the payment of the duties was set forth in the protest with sufficient precision and distinctness to bring the case within the provisions of the Act of the 26th of February, 1845, authorizing such a suit in cases where the protest is made in writing and sets forth distinctly and specifically the grounds of objection to the payment. 5 Stat. at Large, 727. Thirdly, whether the legal rate of duty upon the hemp included in the entry was the sum exacted by the collector or only $25 per ton as assumed by the plaintiff.

I. Recurring to the second section of the Act of the 3d of March, 1839, it will be seen that it provides in effect that the money paid to any collector of the customs after the passage of that Act for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasury of the United States, to be kept and disposed of as all other money paid for duties; and it expressly

provides that such money "shall not be held by the collector to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid." 5 Stat. at Large, 348.

Prior to the passage of that act, it had frequently been held that an action of assumpsit would lie against a collector to recover back duties illegally exacted by him of the importer; but this Court held in *Cary* vs. *Curtis*, (3 How., 236,) that the provisions of that section where the money had been paid into the Treasury of the United States were a bar to any such action to recover back duties paid subsequently to the passage of that act. Some of the judges dissented on the occasion, but the concluding portion of the opinion given by the Court rests, it is believed, upon the solid foundations of reason and justice. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. Such a promise, say the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were required to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this Court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an Act of Congress. Applying that rule to the present case, it is quite obvious that the answer to the first question presented must be in the negative. Importers, however were not without remedy under that Act but when

ever it was shown to the satisfaction of the Secretary of the Treasury that more money had been paid to the collector for such duties than the law required, it was made his duty to draw his warrant upon the Treasurer to refund the over payment.

II. Congress, on the 26th of February, 1845, gave a different construction to that provision, and provided in effect that "any person or persons who have paid or may hereafter pay money" under protest, as and for duties not authorized by law, to any collector of the customs in order to obtain the goods or merchandize imported by him, may maintain an action at law against such collector to ascertain and try the legality and validity of such demand and payment, but the same section also provides to the effect that no such action shall "be maintained against any collector to recover the amount of duties so paid under protest unless the said protest was made in writing * * * setting forth distinctly and specifically the grounds of the objection to the payment thereof. When the duties in this case were paid the provision just recited was not in existence, and it is insisted by the plaintiff that it cannot have a retroactive effect so as to require the protest of the plaintiff to conform to its terms; but if that be so, then it is clear that the defendant must prevail in the suit, as the plaintiff has no right of action whatever against the defendant unless it be by virtue of that provision. His importation was made while the Act of the 3d of March, 1839, was in operation, and when he paid the duties in question, importers in such cases, according to the decision of this Court, had no right of action whatever against the collector of the customs. Those who had no right of action under the old law cannot rightfully complain of the terms and conditions annexed to the remedy given in the subsequent Act of Congress. All such as have claims falling within it have a right to avail themselves of its provisions, because the right of action given is in its nature a remedy against the Government, but they must accept it as such with its conditions.

Protests according to that law must be made in writing, and must be signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of the

objection to the payment as before stated. Parties who have made such protests upon the payment of duties were placed upon the same footing with those who should thereafter make such protests, and all such were authorized to seek their remedy in an action at law against the collector as the representative of the Government, but it cannot for a moment be admitted that a party can have the benefit of an Act of Congress unless he shows that his case is within its provisions. No allusion whatever is made in the protest to any such ground of objection to the payment of the duties as that taken at the trial, nor any other except the general objection already stated. Unless the grounds of objection to the payment of the duties are distinctly and specifically set forth in the protest it is plain that it cannot be held to be sufficient without a departure from the express requirement of the Act of Congress under which the suit was brought.

Iron in bars, as well as hemp in bundles, is included in the entry, and yet the protest is "against the payment of the duty charged in the entry" without any discrimination as to the packages, and consequently applying as well to the iron as to the hemp, and to the whole amount of the duties charged upon the entire importation. No pretence is now made that the duty charged upon the iron was illegal or excessive, and the plaintiff concedes that the hemp was subject to a duty of $25 per ton. Irrespective of authorities, therefore, it is impossible to hold that the protest in this case is sufficiently distinct and specific to admit the objection to the payment set up at the trial. Numerous decisions have been made upon the subject, but there is not one of them that affords the slightest support to the position that the protest in this case constitutes a compliance with the requirement of the Act of Congress. On the contrary, every one of them affirms the rule that the importer must at least indicate in his protest distinctly and definitely the source or ground of his complaint, and his design to make it the foundation of a claim against the Government. *Greeley's Adm.* vs. *Burgess et al.*, (18 How., 417); *Swanton* vs. *Morton*, (1 Cur., C. C., 294); *Warren* vs.

Peasler, (2 Cur., C. C., 235); *Thompson* vs. *Maxwell*, (2 Blatch. C. C., 391).

Persons importing merchandize are required to make their protests distinct and specific, to apprise the collectors of the customs of the nature of the objections made to the payment of the duties before it is too late to remove them or to modify the charge, and in order that the officers of the Government may know what they have to meet in case they decide to exact the duties, notwithstanding the objection, and expose the Government to the risk of litigation. For these reasons we are of the opinion that the second question presented for the consideration of the Court must also be answered in the negative, and consequently the plaintiff cannot recover in this case. Having come to that conclusion it is unnecessary to consider the question arising upon the merits The judgment of the Circuit Court therefore is reversed with costs, and the cause remanded, with instructions to issue a new venire.

TAYLOR *vs.* MORTON.

1. A case coming into this Court from the Circuit Court on a writ of error, issued under the 22d section of the Judiciary Act, when the record shows that no exception was taken below, is not to be treated like a case with a similar record which comes up from a State Court under the 25th section.
2. In a case which comes from a State Court, under the 25th section, it must appear by the record that some one of the questions stated in that section arose and was determined, otherwise this Court is wholly without jurisdiction and can only dismiss the writ
3. If the cause is brought up from a Circuit Court it is to be either affirmed or reversed, and it will of course be affirmed if the record does not present some ground of reversal.

This was a writ of error to the Circuit Court of the United States for the District of Massachusetts. It was like the case of