a finality, not only on the question of title, but as to the boundaries which it specifies. If erroneous in either particular, the remedy was by appeal; but the appeal having been withdrawn by the government, the question of its correctness is forever closed.

The decree of the District Court is

AFFIRMED.

Messrs. Justices CLIFFORD, MILLER, and SWAYNE, dissented.

THE INSURANCE COMPANIES *v.* WRIGHT.

1. Where a written contract is susceptible on its face of a construction that is "reasonable," resort cannot be had to evidence of custom or usage to explain its language. And this general rule of evidence applies to an instrument so loose as an open or running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way. NELSON and FIELD, JJ., dissenting from the rule, or from its application in this case: in which there was a clause that, as they conceived, made the evidence of usage proper.
2. The expression "rate," or "rating" of vessels, as used in policies of assurance, means relative state in regard to insurable qualities. Hence, where a policy requires that a vessel shall not be below a certain "rate," as, *Ex gr.*, "not below A 2;" this rate is not, in the absence of agreement to that effect, to be established by the rating-register alone of the office making the insurance—certainly not unless the vessel was actually rated there,—nor by a standard of rating anywhere in the port merely where that office is. There being, as yet, no "American Lloyds," the party assured—if not actually rated on the books of the office insuring—may establish the rate by any kind of evidence which shows what the vessel's condition really was; and that, had she been rated at all at the port where the office was, she *would* have rated in the way required. He may even show how she would have rated in her port of departure, or in one where the company insuring had an agency through which the insurance in question was effected; this being shown, of course, not as conclusive on the matter of rate, but as bearing upon it, and so fit for consideration by the jury.
3. Evidence is not admissible of a general usage and understanding among shippers and insurers of the port in which the insuring office is, that in open policies the expression used, as *Ex gr.*, "not below A 2," refers to

the rate of vessels or the register of vessels making the insurance. SWAYNE and DAVIS, JJ., dissenting, on the facts of the case, as to this last point.

THESE were actions brought by Wright against two insurance companies in New York—"The Orient Mutual" and "The Sun"—on two policies of insurance, called open or running policies; a sort of policy which has been described in this court* as one enabling the merchant to insure his goods shipped at a distant port, when it is impossible for him to be advised of the particular ship upon which they are laden, and which, therefore, cannot be named in the instrument of assurance. The insurer upon this class of policies, of course, has no opportunity to inquire into the character or condition of the vessel, and agrees that the policy shall attach if she be seaworthy, however low may be her relative capacity to perform the voyage; and, for the additional risks he may thus incur, he finds his compensation in an increase of premium.†

The two suits brought on the two policies here, were tried together in the court below, and so argued and disposed of here; the principles in each case being confessedly, and so declared by the court, the same.

The policies professed to insure Wright against loss on one-fourth of five thousand bags of coffee, to be shipped on board of "good vessel or vessels" from Rio de Janeiro to any port in the United States. Thus far the case was plain. The difficulty arose from certain clauses relating to the *premium;* of which clauses there were several scattered about the instrument. One such, just after the declaration of insurance made, was thus: "*To add an additional premium if by vessels lower than A* 2, or by foreign vessels; to return $\frac{1}{4}$ of 1 per cent. if direct to an Atlantic port." The policies also contained this clause: "Having been paid the consideration for this insurance by the assured at the rate of $1\frac{1}{2}$ per cent., *the premiums on risks to be fixed at the time of the indorsement,*

* Per NELSON, J.; Orient Mutual Insurance Company *v.* Wright et al., 23 Howard, 495.

† Ibid.

and such clauses to apply as the company may insert, as the risks are successively reported."

The companies here sued, though New York companies, had an agent in Baltimore, through whom they effected insurances there; and it was through this agent that the present insurances were made. His testimony went to prove that when applications were made to enter risks on running policies, the application was indorsed at once by him, and a report made to the company in New York, which named the premium, and that this was made known to the assured; that the premiums specified in the body of the policies are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums; and that the nominal premiums taken on the delivery of a running policy, are returned if no risks are reported.

On the back of one or both the policies here, were entries as follows, which, it was argued, explained this alleged custom:

1855. Aug. 13. Bark Maine Law, from Rio to New Orleans, $15,750, at 1½ per cent.
1855. Aug. 13. Brig Windward, from same place to Baltimore, $4750, at 1¼ per cent.
1855. Nov. 20. Brig T. Walters, from same place to Philadelphia, $2375, at 1¼ per cent.

In the present cases the plaintiff applied, in the latter part of August, 1856, to the agent in Baltimore, for an indorsement on the policy of the coffee in question, laden or to be laden on board a vessel called the "Mary W.," from Rio de Janeiro to New Orleans, which application was communicated to the company, in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description of a "good" vessel, on account of her alleged inferior character; but the plaintiff, insisting on her seaworthiness and his right to insure within the terms of the policy, the company replied to his application: "We shall charge the same rate as the Sun does, viz., 10 per cent., subject to average, or 2½ per cent. free of average." This the plaintiff refused to pay. The

company thereupon claimed to be released from the risk. The plaintiff asserted that there was still a subsisting contract.

The coffee had been shipped on the Mary W. at Rio, for New Orleans, 12th July, 1856, when she started on her voyage. The vessel was lost on the 29th of the month upon rocks; the master being some seventy miles out of his course.

The cases had been already before this court, in 1859 (23 Howard, 401, 412),* by writ of error from a former trial. *On that trial it was conceded that the vessel rated below A* 2: or that the testimony might lead the jury to this conclusion. And on review here, this court held, that if this were true, then, inasmuch as no rate of premium had been fixed by the agreement of the parties, and the plaintiff had refused to pay the additional premiums which the companies had demanded, there was in reality no contract of insurance consummated as to the goods on that vessel. As the instructions of the court below had assumed that the contract was complete, although the vessel might rate *below* A 2, and although no agreement had been made for the increased premium, the cases were reversed and a new trial ordered. On this second trial the plaintiff sought to establish, and contended that he had established, that the vessel was within the rate prescribed, and in fact was not a vessel lower than A 2.

On this second trial, the defendants having given testimony (much the same testimony as that above mentioned as given on the first), tending to establish a usage that the premium named in the policy was in all cases a nominal one, and that the insured had a right, when the risk was reported, to vary the rate of premium as he might wish—asked the court for eleven instructions; the material parts of the seventh, eighth, and ninth being as follows:

Seventh. That if they found from the testimony and course of dealing of the parties, that the premium specified in the body of the policy was a nominal premium only, to which no atten-

* See Orient Mutual Insurance Co. *v.* Wright, and Sun Mutual Insurance Co. *v.* Same Defendant.

tion was paid in fixing the true premium to be paid, then the company had the right to fix the premium at the time of indorsement, whether the vessel rated A 2 or not.

Eighth. That by the true interpretation of the policy, in the custom referred to in the preceding prayer, the insurer had the right, in good faith, to fix the real premium above or below the nominal premium, where the vessel rated A 2 or above it.

Ninth. That by the true interpretation of the policy, the real or actual premiums on risks were to be fixed by the companies at the time of return or indorsement of the risk, and that the premiums so fixed by them in the case of the "Mary W.," not having been assented to by the assured, the premiums in that case cannot now be fixed by the court or jury; and further, that by the true interpretation of the policies, the real premiums on risks are not fixed therein without action by the parties, whether the vessel rates A 2 or above or below that rate.

These instructions the court refused to give, and the only question submitted to the jury was, whether the vessel in which the loss occurred did or did not rate below A 2, within the meaning of the policy.

But another question here arose; the question, to wit, by what standard was this fact, whether the vessel did or did not rate below A 2, to be fixed? Was it by that of Rio, whence she sailed? Or by that of Baltimore, where the application for insurance was made? Or by that of New York, where the policy was issued? Or by the register of the company which made the insurance?—with a conclusion that if *that* were silent, the vessel was not A 2 within the meaning of the contract at all. It was proved that the standard of rating was different at Rio and Baltimore from what it was at New York, being higher in the last-named city than it is in either of the former ones; so much so, indeed, that a vessel might be rated A 2, at Rio and Baltimore, which would fall below that rate at New York. It was also proved that each of the marine companies of New York keeps constantly in its employment a salaried officer, whose business it is to examine and rate vessels, and that the rates of the vessels thus examined by him are reported to the company, and en-

tered upon a book kept for that purpose. Mr. Swan, of the house of Grinnell, Minturn & Co., large shipping merchants of New York, testified that "the business of rating is a special one; that the companies all have inspectors to ascertain the rating of vessels, and that when a policy speaks of the rate of vessels, it is the rate of the company, and refers to that standard." There was other testimony to the same effect. Testimony was given also, however, showing that this rating differs materially on the registers of different companies, and that we have not yet established in this country any institution similar to that of the British Lloyds; though there is one in New York calling itself the American Lloyds, and now attempting to establish for itself here the same position as the one in England, which has its inspectors in all ports of the United Kingdom, whose reports are forwarded to a board in London, which fixes the rate of all vessels which are known to it, and whose owners are willing to have them examined. In fact, with regard to this particular vessel, it appeared that in 1849, she had three different ratings out of five which it was proved had been made of her; that she left New York in the year last mentioned for California, and has never been in the port of that Atlantic metropolis since; that 1849 was the last year in which she was rated on the books of the "Sun Mutual" at all; while the "Orient Mutual" had not been established until 1854, and of course had her not upon any register of theirs; and shown finally that a rating seven years old is regarded by all insurers as no rating at all.*

* The position of the vessel in 1856, with the Sun Company, as to her "rating," as an insurable risk, was as follows: She was rated in 1847, on the books of the Sun Company, "A 2½," being then between one and two years old, and then first appearing on the company's books. In 1848 she was again examined by the inspector of the company, and her condition noted, the same *rate* being retained. In 1849, she having been remodelled, she was again examined by the inspector, and noted in the books of the company thus: "January, 1849, docked, caulked, and coppered; the centreboard taken out; the bottom planked, repaired. *California; let her go.*" The inspector explained the words, "California; let her go," thus: "I mean that she was bound to California; and by the words, 'let her go,' that

The plaintiffs were allowed to give evidence that at Baltimore and at Rio she was rated A 2; and particularly to give in evidence a memorandum in writing, signed by the counsel of the insurance companies, and which they had given in order to expedite a trial, that the vessel in question, at the time she left Rio, "was in a seaworthy condition, fit for any voyage, and especially for the transportation of coffee;" and by reason of thorough repairs at Rio, was "entitled to rate, and did in fact rate, at A 2 *there*." There was evidence also tending to prove that she so rated elsewhere, and ought to have so rated in New York; but much testimony also tending to prove the reverse.

The court below allowed the above-mentioned memorandum to go in along with other evidence, both evidence in favor of the plaintiff and evidence against him; including, in the former, evidence of this vessel having been newly and thoroughly repaired, and the testimony of seamen long engaged in the trade of this part of South America, and including the testimony of marine experts, and proof of the mode in which the vessel had been rated more than seven years before the policy issued. And disregarding the prayers of the defendants presented in some five or six different forms, and praying instructions that the standard of rate was to be determined by the books of the defendants and of other insurance companies in *New York*, charged them essentially as follows:

"If the jury should find that the rating of vessels on the registers of companies in New York, was always from personal examination by inspectors of the different companies, and should further find, that by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York, no fixed rating on the registers of any of

she was not insurable for a sea-voyage; as a mark to indicate for the company *to let her alone; to let her slide;*" and said that the remodelling of the vessel, by taking out the centre-board, would degrade her rate from $2\frac{1}{2}$ to 3. He said that in 1855 and 1856, the vessel would have had no insurable rate in the Sun Company, that is, for a foreign voyage; she had a rate for coastwise voyages all the time; that rate was A $\frac{1}{2}$.

the insurance companies of that city in 1856 (the date of the contract); but would have been rated there not lower than A 2 —owing to her thorough repair, had she been there for examination—then the plaintiff is entitled to recover, although the jury may find that the said vessel was rated in 1848 or 1849, on the books of the defendant, below A 2; and that *it was the general usage and understanding of underwriters and commercial men in New York, that the words in their policies 'not rating below A 2,' refer to the rate of vessels on the register of the company making the insurance.*"

The rejection by the court of the defendant's seventh, eighth, and ninth prayers, given on pp. 459–60, and its refusal to submit, in interpretation of the contract, the practice and course of dealing between the insurance companies and its customers, as shown by the Baltimore agent, in regard to the nominal premiums, were the errors relied on in the first part of the case; as were the instructions as to the evidence of rating, and the admission of the memorandum and other evidence at Rio, those relied on in the second.

Messrs. Alexander Hamilton, Jr., Evarts, and Cutting, for the Insurance Companies, plaintiffs in error:

1. An open or running policy is issued when the shipments to be protected thereby, the time of making them, the vessel or vessels to carry them, the ports of destination, and the value or amount of the cargo, and other circumstances material to the risks to be borne by the underwriter, have no present existence, or are unknown to either of the parties. The contract is necessarily incomplete, though binding upon the underwriter, to the extent of the agreement. It contemplates that if the assured shall desire to avail himself of his right to be protected under it, he shall, when the risks to be insured are known to him, or within a reasonable time thereafter, make a declaration, return, or report of them to the underwriter, with all essential particulars, in order that the premium to be charged may be estimated by the insurer; and, if agreed to, may be entered with the particulars upon the policy, which is "open" to re-

ceive them.* The indorsements on these very policies furnish examples by way of illustration. The indorsements specify the successive cargoes insured, the different vessels by which each was to be carried, the port of departure, the several ports of destination, the value of each different shipment, and the rate of premium charged by the insurer, and agreed to by the assured, on each risk.

Until the return, by the merchant, of risks not known at the time of making the agreement to insure, no basis exists upon which the consideration or premium for assuming the hazards can be estimated or named by the underwriter. Consequently, an open or running contract to insure separate sums upon unascertained, future, successive, and distinct shipments, to be thereafter declared or reported by the merchant, is an agreement that the underwriter will assume the risk as to them, at and from the lading thereof, in consideration that the assured will pay *or agree to pay such premium as shall be in good faith named by the insurer* as an adequate compensation for the risks to be assumed by him.†

As the premium or consideration to be paid must, of course, vary according to the degree of hazard of each shipment, and as this cannot be ascertained until each shipment has been made or is known, and a declaration or return thereof has been reported by the merchant to the underwriter, it is the practice to specify in these agreements to insure, a nominal or average rate of premium, which is subject to such addition or deduction as shall make the premiums conform to the established rate at the time the return is made to the company; and, sometimes, as in the present case, a further stipulation is introduced, that if the shipments shall be made by foreign vessels, or by vessels rating lower than A 2, an additional premium shall be charged. In practice no attention is paid by either party to the nominal or average consideration, specified in the agreement to insure.

* 1 Phillips on Insurance, 3d ed., pp. 26, 273; Neville *v.* M. & M. Ins. Co. of Cincinnati, 17 Ohio, 192; S. C. on Reversal, 19 Id., 452; Douville *v.* Sun Insurance Co., 12 Annual, 259.

† Hazard *v.* New England Mar. Ins. Co., 8 Peters, 583.

The premium is calculated on each shipment, separately, each case being distinct, and the rate being dependent upon the character of the vessel, the port or ports of destination, the season of the year, and other circumstances calculated to increase or to diminish the hazards. A premium note for the nominal or average premiums upon the amount subscribed, is taken at the time the open policy is issued, and is returned to the merchant in case he should not avail himself of the protection of the contract, with the exception of one-half per cent., which the underwriters, in accordance with a very ancient custom, have the right to retain, although in practice this right is seldom enforced, it being now usual to return the whole amount.* The reason for this right to retain one-half per cent. is that, as the assured may never choose to avail himself of the contract, or may put a stop to any adventures under it whenever he may think proper, while, on the other hand, the insurer can never by his own act discharge himself from the agreement, it is but reasonable that the merchant should make some compensation to the insurer for his trouble and disappointment.

The rates of premium at which underwriters can afford to take hazards is the basis upon which the whole business of insurance rests. Great discrimination and accuracy of judgment is necessary in estimating the degrees of risks. In the practical conduct of his affairs, therefore, it is vital that the insurer should have the power to determine his rate of charge, leaving it, of course, optional with the merchant to accept or to reject it. Hence, under the agreement contained in the policy in controversy, as the risks to be insured at the time when it was effected, were not known, and did not exist, it was impossible to estimate the premiums to be paid, and therefore the agreement being necessarily incomplete, various reservations were made, and amongst others, the essential one, *the premiums to be fixed at the time of the indorsement, and such clauses to apply as the company may insert as the risks are successively reported.*

* 2 Arnould on Insurance, 1237.

In open or running policies, where the agreement is to insure cargo that is afterwards to be reported, and where the shipments are to be successive and independent, of distinct quantities, to be shipped at various and unforeseen times, by unknown vessels, of different classes, and of different nations, on different voyages, there must necessarily exist, as the risks are returned to the company, and the rates of premium are named by it and assented to by the assured, as many different contracts of insurance as there are different subjects to insure, and these contracts are as distinct as if each was made the subject of a separate policy. The rate of premium on each risk reported, must depend upon the particulars of each. When the company has in good faith estimated and determined the rate of premium which it deems to be commensurate with the risk reported to it, and the merchant considers it too high, and refuses to agree to it, the contract, as to that shipment, has not become complete. The merchant has the right to be protected by the policy, at and from the lading of the cargo, if he chooses to agree to pay the premium demanded by the company therefor. But if he prefers, he may decline to pay it, in which case, as the whole consideration fails, the company may refuse to enter the risk, or if an entry has been made, may strike it from their books.*

The court, therefore, erred in refusing to let the practice about these policies be shown. No instruments are so loosely drawn as policies of insurance. None depend so much, or are so frequently explained by usage, and without resort to it, it is sometimes impossible to interpret them at all.

2. The proofs admit of no dispute as to the "rating" of the policy, referring to the "rating" *on the books of the company issuing the policy*. The loosest interpretation of this word in the policy, under the evidence, cannot carry it beyond a reference to a "rating" upon the books of the marine insur-

* Douville *v.* The Sun Mut. Ins. Co., 12 Louisiana Annual, 259; Neville *v.* M. and M. Ins. Co., 17 Ohio, 192, 205, 213; 19 Id., Same Case, 452; reversing.

ance companies in the city of New York. There is no evidence that, in 1856, the vessel in question was *not* a vessel "rating lower than A 2" on the books of the Sun Mutual Insurance Company, the defendant below. Nor evidence that, in 1856, she was *not* one "rating lower than A 2" on the books of the marine insurance companies in the city of New York, or of any of them. There is evidence, that in that year, she *was* a vessel "rating lower than A 2" on the books of the defendant below, and of the other marine insurance companies of the city of New York; for, it is manifest that any evidence to the effect that she had, in 1856, come to be *disrated*, or *fallen below any insurable rate*, is emphatic evidence that she was a vessel "rating lower than A 2" on such books.

II. The instructions were erroneous in their whole scope and effect. Instead of submitting to the jury the question of fact as to what was the actual rate of the vessel on the register of the defendant or other insurance companies in New York, they instructed and authorized the jury, *as experts*, to determine what would be the rate in New York from the actual rating on the companies' registers, in connection with other elements submitted to them. They thus took away from the companies the determination of a technical and difficult question, which, under the policy as well as usage, *they* had a right to decide, and substituted the rude and necessarily imperfect conclusions of a jury in its place, and permitted the jury to ascertain and determine what *would* be her rate, in their opinion, as against her actual rating on the registers of the insurance companies in New York.

III. So, too, it was erroneous to submit to the jury the evidence that when the vessel left Rio she was *seaworthy*, and in good condition, and had just been thoroughly repaired, and was specially fit for the transportation of coffee, and *then rated there at A* 2. Such evidence was irrelative; for no question was raised as to the seaworthiness of the vessel. Moreover, it confounded two distinct questions, the questions, to wit, of seaworthiness and of rating; and probably misled the jury. Finally, it did not tend to show her rating in New

York (the only matter we assume important to be shown), as against the fact that she was actually rated there.

Messrs. Brent and May, contra:

Mr. Justice MILLER delivered the opinion of the court, and after stating principal facts, proceeded as follows:

The only question submitted to the jury on the second trial, the record of which is now before us, was whether the Mary W., the vessel in which the loss occurred, did or did not rate below A 2, within the meaning of the policy. Some of the instructions prayed by the defendants, and refused by the court, proposed to submit to them another question. Having given testimony which tended to establish a usage, that the premium named in the policy was in all cases a mere nominal one, and that the insurer had a right, when the risk was reported, to vary the rate of premium as he might wish, they asked the court to instruct the jury that if such a usage were proved, then the defendants had the right to demand, as they had done, an increased rate, which plaintiff had refused to give, without any regard to the rating of the vessel above or below A 2; and that plaintiff could not recover. This is the substance of the *seventh* and *eighth* instructions prayed by defendants.

Their *ninth* prayer, assumed that such was the construction of the policy, without any aid from usage to assist in its interpretation.

We do not think that the policy on its face can be so construed. It is signed by the defendant, and not by the plaintiff. All its promises are made by the defendant in its own language. All its exceptions and reservations are those of defendant. The rule is that when in such cases the language requires construction, it shall be taken most strongly against the party making the instrument.

The various phrases which relate to this matter of premium, are scattered through the policy "in most admired disorder." They may be brought together and stated thus: The plaintiff is insured on one-fourth of five thousand bags of coffee, from Rio de Janeiro to a port or ports of the United

States. The consideration of the insurance is acknowledged to be paid at the rate of 1½ per cent.; an additional premium if shipped by vessels lower than A 2, or by foreign vessels; a return of ¼ per cent., if shipped direct to an Atlantic port; the premium on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported. As it was not known that the coffee had been shipped, or on what vessels it had been or might be shipped, they were to be reported as soon as the owner received advices. Then the premium on the risks was to be fixed. But by whom and by what rule? The policy, we think, answers this, except in the case of a foreign vessel, or one rating below A 2. In either of these cases the premium was to be increased. If the shipment was direct to an Atlantic port, ¼ of 1 per cent. was to be deducted. But if the vessel was not a foreign vessel, nor one that rated below A 2, nor the shipment direct to an Atlantic port, then the premium was already fixed, and the money paid, and nothing more remained to be done in that respect.

This provision, that the premium shall be fixed at the time of the indorsement of the risk on the policy, has its full use and function in the three contingencies above-mentioned, wherein it is expressly stipulated that the rate shall differ from one and one-half per cent. The very fact that these three contingencies are expressly named, in which a different rate of premium may or shall be charged, excludes the idea that one of the parties may vary the rule in *all* cases, or in *any other case.*

Much weight is attached in the argument in this connection, to the phrase "such clauses to apply as the company may insert, as the risks are successively reported." It is not necessary to determine here what is the character of the clauses referred to, or what effect that phrase might have under certain circumstances. A war, a blockade, or some other change of affairs occurring after the policy was signed, might justify the company in inserting some clause for its protection, but we do not think it can be so construed as to authorize a clause changing the rate of premium in a case

where it is fixed by the other terms of the contract. No such clause was added, or proposed to be added to the policy by the company, and it is useless to speculate on what might or might not have been successfully claimed, in a case where no claim was made.

We have thus shown that the instrument has a well-defined meaning in reference to the rate of premium, and that it does not justify the ninth instruction asked by the defendants.

When we have satisfied ourselves that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose. In speaking of usages of trade, Greenleaf says:* "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful and various senses." Again, he says,† "But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain." In the case of the *Schooner Reeside*,‡ Mr. Justice Story, after using language strongly condemning the tendency to introduce and rely on usages in courts of justice, and defining their true office in the language just cited from Greenleaf, proceeds to say: "But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts,

* On Evidence, vol. 2, § 251. † Id., § 292. ‡ 2 Sumner, 567.

but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." These views, in addition to the high source whence they came, commend themselves to our judgment by their intrinsic soundness. "Not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by necessary implication. For a custom can no more be set up against the clear intention of the parties, than against their express agreement, and no usage can be incorporated into a contract which is inconsistent with the terms of the contract."*

Tested by these principles the usage attempted to be set up in the case at bar cannot be sustained. It contradicts directly the written contract. It proposes to set aside all that is said about the rate of premium, and substitute the discretion of one of the parties to the instrument. It goes upon the assumption that all that is written in the contract, which fixes, or ascertains, or limits the amount that may be claimed for premium of insurance by the company, is nugatory, and that the whole field is left open, and the power placed in the hands of one of the parties exclusively. No such usage can be admitted thus to contradict, vary, and control this contract.

The court below was right in refusing the prayers of the defendants which we have been considering, and in submitting as the only question for the jury to determine, the rating of the vessel in reference to A 2.

Upon this question the defendants below, in some five or six forms, prayed that the jury be instructed that it must be determined by the rating of the vessel on the books of the defendants, and other insurance companies in New York. The court refused the prayers, but told the jury, that "if

* 2 Parsons on Contracts, 59; Blivin et al. *v.* The N. E. Screw Co., 23 Howard, 431; Atkins *v.* Howe, 18 Pickering, 16; Bogert *v.* Cauman, Anthon N. Y. R., 70; Allegre *v.* The M. Ins. Co., 2 Gill & Johnson, 136.

they should find that the rating of vessels on the registers of the companies in New York was always from personal examination by inspectors of the different companies, and should further find that by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York no fixed rating on the registers of any of the insurance companies in that city in 1856," (the date of the contract), "but would have been rated there not lower than A 2, owing to her thorough repair, had she been there for examination, then the plaintiff is entitled to recover, although the jury may find that the said vessel was rated in 1848 and 1849 on the books of defendant, below A 2; and that it was the general usage and understanding of underwriters and commercial men in New York, that the words in their policies, 'not rating below A 2,' refer to the rate of vessels on the register of the company making the insurance."

It is claimed by the plaintiffs in error, that the proposition submitted to the jury as to the rating of the vessel, must be determined exclusively by a reference to the books of the company making the policy. Although no such instruction was asked in the court below, it is urged upon this court that such is the true construction of the contract, and that the charge of the court was in conflict with this position.

There is nothing in the language of the policy itself to indicate the source to which we are to look for the determination of the rating of the vessel. The reasonable inference would seem to be, that, like any other question of value, or quantity, or quality, left open in a written contract, it should be decided by a reference to all the sources of information which enable the jury to fix the rate correctly. What is meant by the rating of vessels in insurance policies? *It means the determination of their relative state or condition in regard to their insurable qualities.* It is a matter which has excited much interest in the commercial world, although we are not aware that it has been often before the courts. In Great Britain there was established, in the year 1834, a department at the British Lloyds devoted to this very business. They

have their inspectors in all the ports of the three kingdoms, whose reports are forwarded to a board at London, and this board fixes the rate of all vessels which are known to it, and whose owners are willing to have them examined. The register thus kept, is the one used and referred to in all contracts of insurance in that country. They, however, have a mode of rating entirely different from any adopted here.* The testimony in this case shows that there is in New York an institution calling itself the American Lloyds, which is now attempting to establish the same position as the one referred to in England. But the proof is, that its rating is not generally adopted as yet, either by insurers or insured; and that each company in New York which does any considerable amount of business, has its own inspectors and its own register for rating vessels. The evidence shows that this rating differs very materially on the registers of the different companies. None of these registers have, or can have, any right to determine conclusively the rate of a vessel, when that question comes to be determined in a court of justice. It would seem that in a question of this kind, left open by one of these insurance companies, and the party whom it has professed to insure, equity would require the matter to be determined, if by the register of any company, by some other than that of the party interested. These registers are the private books of the companies. They are not for public use, and can only be seen by the courtesy of the companies' officers. Under these circumstances the justice of the principle which would refer the rating of the vessel exclusively to this register of a party to the suit, when no such provision is inserted in the policy, is not perceived. If they make their contracts, intending to assert such a claim, fair dealing requires that they insert it in their policy.

But testimony was introduced tending to show that, by the usage of underwriters and merchants in New York, the rating referred to was the rating on the register of the company which made the policy, and the court instructed the

* See McCulloch's Commercial Dictionary, p. 1169.

jury to disregard this usage if they should find that there was no rating of this vessel on the books of one of the defendants, and none since 1849 on the books of the other company.

The testimony shows that the Mary W. left New York in 1849, and has never been there since, and that was the date of the last rating on the books of the "Sun Mutual Insurance Company," one of the defendants, and that the "Orient Mutual," the other defendant, came into existence in 1854, and the Mary W. never had a rating on its register.

It was also proved by several witnesses, and is uncontradicted, that a rating seven years old is regarded by all insurance men as no rating at all. Here is a case, then, where a party is seeking to incorporate into his contract a usage, that the rating mentioned in his policy must have exclusive reference to his own register, when the vessel supposed to be insured is not on that register at any rating whatever. It must be remembered that we are now trying to arrive at the intent of the parties at the time the policy was made, and that this usage is introduced to assist us in that effort. Can it be believed that the contracting party, who paid his money at that time for insurance on coffee, to be shipped on any vessel that was seaworthy, whether below A 2 or above it, whether foreign or domestic, had any idea that he was limited in the selection of his vessel, to such as might be found on the register of the company he was dealing with? Or that the company, which professed to insure the coffee on home vessels or *foreign* vessels, on vessels rating above or below A 2, on shipments to Atlantic ports or Gulf ports from Brazil, intended to limit the plaintiff to the use of vessels whose names might be found on their register? And this, too, when one of the companies had no register reaching back more than two years. Yet we must believe this, if we hold the usage mentioned in the instrument as controlling the case.

It is not, however, necessary to go any further in this case than to decide, as we do, that such usage, if it were admissible at all, could only apply to the case of a vessel which

had an actual rating on the books of the company so recent as to be recognized by insurers as a valid rating. And that as the Mary W. had no such rating on the books of the defendants, the usage cannot apply to these contracts. Such was evidently the view of the court below, in which we think it was correct.

But the court was asked by the defendants below to instruct the jury, that in determining the rate of the Mary W., they must confine themselves to the registers of the defendant *and the other insurance companies of New York.*

The vessel had no rating on the books of any insurance company in New York, later than 1849, which was more than seven years before the risk was claimed to attach in these cases. It was, as we have already said, fully proved that such a rating was wholly disregarded by all insurance companies, as being of no value. The effect of the instruction would have been, to confine the jury to testimony which would give them no light on the subject they were directed to consider; indeed, to that which could not be called evidence at all. And the argument that plaintiff could not be supposed to have contracted with reference to any such rule as this, is quite as forcible as it is in regard to the claim to confine the evidence to defendants' own books. In this instance, there is no claim that the rule is supported by any usage. These registers differ among themselves, and those offered in evidence show that at the time the Mary W. left the Atlantic coast for California, in 1849, she had as many as three different ratings on the books of the five companies whose registers were offered in evidence. Which of these should prevail, even if they were recent enough to be admissible? Shall the jury be excluded from all other evidence to explain these differences, or to show the relative value or reliability of these different estimates? Can any sound reason be given for such exclusion? It is supposed that the few companies which may happen to have a vessel on their register have exhausted the means of information as to her character, and that no one else can throw any light on it? So far from restricting the jury in this manner, it seems to

us that as the true object of inquiry is to fix the insurable character or status of the vessel, they should be at liberty to hear any testimony which would tend to show her capacity for resisting the perils insured against. It is therefore our opinion, that when the court instructed the jury to base their verdict on the fact to be ascertained by them, whether the Mary W. would or would not have rated below A 2 *in New York, had she been there for examination*, the rule was stated quite as favorably to plaintiffs in error as sound principle will justify.

It is objected that the testimony of certain persons in Rio, and especially the agreed statement that she was entitled to rate as high as A 2, at that place, was not competent under the issue. We think this fact might well be submitted to the jury with many others, none of which were conclusive, but all bearing on the question before them. The fact that she had been newly and thoroughly repaired, had been surveyed before and after the repairs, and the results of these surveys, the results also of examinations made by seamen long engaged in the trade between Rio and the United States, were the best, perhaps the only evidence, of her then condition and insurable status. When the court, in addition to these facts, admitted on the part of plaintiffs in error, the opinion of New York experts on this testimony to go with it, and also the seven years' old rating of the plaintiffs in error, and other insurance companies, we cannot but conclude that the case went fairly to the jury on the testimony. None of it was held conclusive. No instruction was asked of the court or given as to its relative value, and as none of it was absolutely irrelevant, we see no error in its admission to the prejudice of the plaintiffs in error.

We have thus examined in detail, and with much caution, the points raised against the verdict below, and, as we find none of them tenable, the judgments are

AFFIRMED.

Mr. Justice NELSON:

The policy in this case underwent a very full examination

when it was formerly before the court.* The evidence in that case showed, and the argument of the counsel proceeded upon the assumption, that the vessel rated in New York, the place of the contract, below A 2; and, inasmuch as the policy provided, in case of that rating, for an additional premium, the principal question was, whether or not the company had a right to fix the additional premium, or, in case of dissent by the insured, it was a question to be determined by the court and jury. This court held, upon a true construction of the policy, that the right belonged to the company. The judgment of the court below was reversed, and the cause remanded for a new trial. On this second trial, which is now before us for review, the plaintiff placed his right to recover upon the ground that, at the time the Mary W. was reported to the company for indorsement on the policy, she, in point of fact, rated A 2, and hence came within the description of vessels in the policy that were to be insured for the premium paid when it was issued, which was $1\frac{1}{2}$ per cent. This ground was denied by the company, and, in addition, they also maintained that even if, as claimed, the vessel rated A 2 at the time of the report for indorsement, they had a right to add to the premium of the one and one-half per cent.; and inasmuch as the plaintiff had refused to pay this additional sum, no insurance of the coffee was effected. This latter position of the company assumed that, upon the true construction of this running policy, no binding contract of insurance existed in respect to a vessel reported for indorsement, whether she rated A 2 or not, until the company had fixed the rate of premium, and the insured had assented to it; and further, that whether the vessel rated A 2 or above that rate, they had a right to demand an additional premium to that mentioned in the policy.

We will reverse the order of the questions as stated, and inquire, first, whether or not the company are bound by the terms and conditions of the policy to insure a vessel for the

* *Vide* Report, 23 Howard, 401, 412.

premium mentioned on the report of her for indorsement, if at the time she rates at or above A 2?

The article insured, as specified in the policy, is coffee, to be shipped from Rio de Janeiro to a port or ports in the United States, the company to add an additional premium if by vessels lower than A 2, or by foreign vessels; ¼ per cent. to be returned if shipped direct to an Atlantic port. The premium paid as the consideration for the insurance, as recited in the policy, is at and after the rate of one and one-half per cent.

If there were no other provisions in this policy relating to the premium than those above stated, it would seem to be plain the coffee shipped in a vessel rating A 2, or above, would come within the description required by its terms as a condition of its binding effect, for the right of the company to add an additional premium is limited to the case of a vessel rating below A 2. If A 2, or above, no addition is to be made, and, if not, the moment the vessel is reported for indorsement the contract is complete. The whole of the premium that could be demanded had been already received by the company.

But there is another clause in this policy, which it is supposed qualifies the above construction, and which is as follows: "The premiums on risks to be fixed at the time of indorsement." The company rely upon this clause as securing to them the right in all cases to fix the premium at the time the risk is reported; and consequently, unless that rate is assented to by the insured, there is an end to the incipient contract, and, as we have already said, the company claims also under this clause to add to the premium in the policy even if the vessel rates A 2, or above, even if she should rate A 1.

In order to understand the force and effect of this clause, it will be useful to refer, for a moment, to the usage of the company in taking these risks on their running policies, as proved in this case. The premiums specified in the body of the policies are regarded as nominal, or rather as average premiums, and the true premiums to be charged are fixed

by *increasing* or *reducing* the average premiums when the risk is reported. This usage explains what is meant by the clause, "The premiums on risks to be fixed at the time of the indorsement,"—for, by recurring to the terms of the policy, it will be seen they provide for the case when an addition to the premium may be made, namely, when the vessel rates below A 2; and also, when the reduction is to be made, namely, in case the vessel rates A 2, or above, and the shipment of the coffee is to an Atlantic port, the reduction then is to be ¼ per cent. This usage has been carried out, practically, during the running of this policy. The following vessels are indorsed on it: "*August* 13, 1855, Bark Maine Law, from Rio de Janeiro to New Orleans, $15,750 at 1½ per cent.; Brig Windward, from same place to Baltimore, $4750 at 1¼ per cent. *Nov.* 20, Brig T. Walters, from same place to Philadelphia, $2375 at 1¼ per cent." This usage and the practice under it, furnishes a full explanation of the clause in question, and reconciles it with the previous parts of the policy, which were supposed to be in contradiction to it. It is true, the premiums are to be fixed at the time the risks are reported, but they are to be fixed in accordance with the stipulations in the policy, which, as we have seen, have specially provided for them. The company can make no additions to the premium except the vessel rates below A 2. If at or above this rate they are bound to deduct the ¼ per cent., when the risks are reported, if shipment be to an Atlantic port.

As to the other provision relied on, namely, "And such clauses to apply as the company may insert as the risks are successively reported." I agree that they have no reference to the questions involved in this case, and may be left for construction when a case arises under them.

The next point in the case, and the only difficult one in my judgment, arises out of the position taken by the plaintiff in the court below, that the vessel Mary W., in point of fact, rated as high as A 2 at the time she was reported to the company.

We lay out of view all questions, so fully discussed on the

argument, whether or not the rating of vessels referred to in the policy, related to the rating in the books of the company, or, if not, to the books of other companies in the city of New York; and whether resort must be had exclusively to these books for the purpose of ascertaining the rating of the vessels; for it appears from the evidence, and is not to be denied, that neither the books of the Orient, or of the Sun company, nor of any other of the insurance companies in the city, contained in contemplation of law a rating of the Mary W., at the time she was reported to the two companies, that could be of any controlling weight on the question. She was not rated in the books of the Orient at all, and had not been in those of the Sun for some seven years; and the same is true in respect to the other companies. There is not evidence in the case, therefore, to raise the questions as to the effect to be given to the rating of a vessel in the books of the company at the time of the insurance; and hence, it would be premature to express any opinion upon them, or upon the effect to be given to the like evidence in respect to the books of other companies at the place of the contract. These are important and interesting questions, and may well deserve the deliberate and careful consideration of the court when properly presented for decision.

The evidence, with a view to ascertain the rate of the Mary W. at the time she was reported for indorsement on the policy, 23d August, 1856, must of necessity be derived as well from other sources as from the books of insurance companies; and the questions are, in this posture and condition of the case, whether the court below admitted improper evidence against the objections of the defendants, and whether the charge of the court in submitting the case to the jury is subject to any of the exceptions taken to it.

As we have seen, there being no evidence in the record of this rating of the vessel on the books of the Orient company at all, nor upon those of the Sun at the time she was reported, within the period of some seven years, after the lapse of which time the rating bound neither the company nor the insured, the question whether the Mary W. rated at

the time reported not lower than A 2, of necessity depended upon general evidence of the character and condition of the vessel, and could not be restrained to the rating in the books; so in respect to the other insurance companies in the city of New York, as the rating in these books was made also some seven years prior to this insurance transaction. And, as it respects this general evidence, the appellate court can only look at such parts of it as were objected to and exceptions taken at the time offered at the trial.

The only exception we find taken is in respect to the competency of the testimony on a commission to Rio de Janeiro, or rather to the admission of evidence as the substitute for the commission, and which is, that the Mary W., at the time she left Rio on the voyage in which she was lost, was in a seaworthy condition, fit for any voyage, and especially for the transportation of coffee; and was, by reason of thorough repairs at Rio, entitled to rate, and did rate A 2 there. We agree that the rating of the vessel at Rio was not the criterion to determine the question before the court and jury. But it was competent testimony, tending to prove the quality and condition of the vessel at the time of her report to the company. The proof of the rating of a vessel consists, not only of testimony as to her construction, materials, age, &c., but also, of the opinion of experts, such as ship-builders and ship-masters, and others familiar with the subject. The record in this case is full of examples of this description of evidence, and the opinion of the witnesses as to the rating of a vessel is but the expression of the result of their examination of her. The rating by official inspectors, with a view to an entry in the books of a company, is evidence of the same character.

Then, as to the charge of the court. It is certainly very comprehensive and involved, and must have been difficult for a jury to understand; but we will endeavor to state the substance of it, which is this: that if the jury should be of opinion from the evidence, that the Mary W. at the time she left Rio was seaworthy and in good condition, and after her repairs was specially fit for the transportation of coffee, and

rated there A 2; and shall further find, that by the long absence of said vessel from the city of New York, there was no fixed rating on the registers of any of the insurance companies in that city in 1856; but that she would have been rated there not lower than A 2, owing to her thorough repairs, had she been there at the time, then the plaintiff was entitled to recover, notwithstanding she rated in the city of New York in 1848–9 on the books of defendants below A 2; and notwithstanding it was the usage and understanding of underwriters and commercial men in that city, that the phrase "not below A 2," referred to the rate of vessels on the books of the company making the insurance.

If this charge is examined with reference to the evidence in the case, we think it is unexceptionable. It must be remembered that there is no testimony found in the record of a rating in the books of the companies, defendants, or in other insurance companies in the city of New York, that could, in any aspect of the case, be controlling. It was necessary, therefore, to go outside of these companies, and resort to general evidence of the character and condition of the vessel, in order to find her rate at the time of the report for indorsement; and in this view of the case, and which we think the true one, the court instructed the jury, if upon this evidence they find that the Mary W. would have rated in the city of New York at the time of the report, the plaintiff was entitled to recover, otherwise not. We do not see how the case could, consistently with the evidence, have been put to the jury more favorably to the defendants. If these companies will undertake to insure vessels according to their rate, when no fixed rate is found in their books at the time, and no fixed standard exists, such as the British Lloyds, in England, by which to ascertain the rate, resort must necessarily be had to general evidence of the character and condition of them at the time of the insurance, with a view to the rate that would be assigned to her in the city of New York, the place of the contract.

For the reasons above given we think the judgment of the court below right, and should be affirmed.

Mr. Justice FIELD concurred in the opinion of Mr. Justice NELSON.

Mr. Justice SWAYNE, dissenting:

Finding myself unable to concur in the conclusions at which a majority of my brethren have arrived, I will state briefly the grounds of my dissent. My remarks will be confined to the case of the Orient company. The same objections apply in both cases.

[His honor here quoted the language of the policy, and stated the principal facts already set forth in the statement of the case, and proceeded]:

When the case was here, as reported in 23 Howard, 401, this court held that if the Mary W. were of a rate lower than A 2, "unless the assured paid or secured the additional premium fixed by the underwriters, the contract of insurance did not become complete and binding." The judgment of the court below was reversed and a *venire de novo* awarded. That adjudication is before us for our guidance, not for review. The reasoning of the court commands my assent.

Upon the retrial of the case in the court below, the main question necessarily was, whether the Mary W. was or was not below the rate of A 2. This proposition involved the further inquiry, By what standard the rate was to be determined? Was it by that of Rio de Janeiro whence she sailed? Was it by that of Baltimore, where the application for insurance was made? Was it by that of the city of New York, where the policy was issued? Or was the question whether she was A 2, to be answered only by the register of the company? and if that were silent, the consequence to follow, that she was not A 2 within the meaning of the contract? It was proved that the rules of rating at Rio and Baltimore were different from those of New York; that the standard at New York was the highest, and that a vessel might be rated A 2 at Rio and Baltimore, which would fall below that rate at New York. It was also proved that each of the marine companies of New York keeps constantly in its employment a salaried officer, whose business it is to examine

and rate vessels, and that the rates of the vessels thus examined by him, are reported to the company and entered upon a book kept for that purpose. Mr. Swan, of the house of Grinnell, Minturn & Co., of New York, a witness examined in behalf of the plaintiff, testified as follows: "The business of rating is a special one. The companies all have inspectors to ascertain the rating of vessels. When a policy speaks of the rate of vessels, it means the rate of the company and refers to that standard." Other testimony to the same effect was given.

Upon the last trial the court instructed the jury that if they should find (1), "That by the long absence of the said vessel from New York, she had, in the understanding and usage of underwriters in New York, no fixed rating on the registers of any of the insurance companies in that city in 1856, but would have been rated there not lower than A 2, owing to the thorough repairs, had she been there for examination, then the plaintiff is entitled to recover in this case . . (2), although the jury find that it was the general usage and understanding of underwriters and commercial men in New York, that the words in these open policies of insurance, 'not below A 2,' refer to the rate of vessels on the register of the company making the insurance."

For the present I pass by the second part of these instructions. A majority of my brethren hold both parts to be correct. Conceding the first to be so, then the testimony should have been *confined* to facts tending to show what the rate of the vessel would have been in New York, if she had been there for examination.

The plaintiff was permitted to prove that she was "A 2," according to the rating of Rio and Baltimore. The defendants objected and excepted. I think this testimony was incompetent and irrelevant. It was wholly immaterial what the rate of the vessel was according to the rules of rating at any other port than New York. The testimony must have tended strongly to mislead the jury. Having found that the vessel was "A 2" at Rio and Baltimore, according to the standard of those places, it was but one step further to the

conclusion, that she ought to have been and would have been rated A 2 at New York.

There are no cases in which it is more important to the right administration of justice that the rules of law should be carefully applied in trials by jury, than in those of the class to which this case belongs. The admission of this testimony, in my judgment, was an error. If such a usage existed as the second part of the instruction supposed, it entered into the contract. In that case it enlightens the ambiguity and ascertains the meaning of terms "A 2" as used in the policy. "It may also be laid down as clear law, that if a man deals in a particular market, he will be taken to act according to the *custom* of that market; and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract shall be made according to the usage of that place."* "Witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that according to the recognized practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning."† "In resorting to evidence of usage for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science, or by a particular class of persons,—and words which have two meanings, the one common and universal and the other technical or local. *In either case*, evidence of usage will be alike admissible to define and explain the technical, peculiar, or local meaning of the language employed. Though in the latter case, it will also be necessary to prove such additional circumstances as will raise a presumption that the parties intended to use the words, in what the logicians call the second intention, unless this fact can be inferred from reading the instrument itself."‡

* 1 Taylor on Evidence, 178, and authorities cited. † 2 Id., 984.
‡ 2 Id., 984–5.

The learned judge, instead of directing the jury to disregard the custom, should have instructed them that if established to their satisfaction, and especially if known to the assured, from his previous transactions with the company or otherwise, it determined the meaning of the terms A 2, and was fatal to the right of the plaintiff to recover.

The construction claimed by the underwriters involved no hardship to the defendant in error. When the parties failed to agree as to the premium, he was at liberty to insure elsewhere. He refused to pay the premium demanded, yet insisted they were bound. The company had a right to guard against the alternative of submitting the rate of the vessel to the judgment of a jury; I think they intended to do so. In any view which I can take of the subject, there was error in the second part of the instructions. For these reasons, in my opinion, the judgment should be reversed, and the cause remanded for further proceedings.

I am requested to say that Mr. Justice DAVIS concurs in this opinion.

HOMER *v.* THE COLLECTOR.

Under the Tariff Act of 1846, as amended by the Tariff Act of 1857, almonds are subject to a duty of 30 p. c. *ad valorem.*

ERROR to the Circuit Court for the District of Massachusetts, the case being thus:

The Tariff Act of 1857, which was an act reducing duties, provided by its first section, that in lieu of the duties then existing, there should be imposed upon the articles in schedule B of the Tariff Act of 1846, a duty of 30 p. c.; and upon those in schedules C, E, and G, of said act, the duties of 24, 15, and 8 p. c. respectively, "*with such exceptions as are hereinafter made.*"

The Tariff Act of 1846 had imposed a duty of 40 p. c. upon the articles enumerated in schedule B, among which were "*almonds*" (by name), "currants," "dates," "figs,"