remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly; for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, "any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed."

THE JUDGMENT IS REVERSED, and the case is remanded to the Supreme Court of Iowa, with directions that it be

DISMISSED FOR WANT OF JURISDICTION.

NEWELL v. NIXON.

1. Although no partnership may exist between them, yet where two persons are joint owners of a vessel against which a claim exists for non-delivery of cargo, and one gives a note in the joint name for a balance agreed on as due for such non-delivery—the other party being aware of the making of the note, and of the consideration for which it was given, and making no dissent from the act of his co-owner—such note cannot be repudiated by such other party, he having bought out the share of his co-owner in the vessel and agreed to pay her debts and liabilities.
2. Where a suit is brought against a shipowner for a sum acknowledged by the owners to be due the shipper, for a breach of contract in delivering merchandise, the production of the bill of lading is not essential.
3. The plea of prescription of one year, under the Civil Code of Louisiana, cannot be set up in a case where the suit is brought in April on an acknowledgment made in September previous of a sum due on settlement.
4. A party suing, not on a note but on the consideration for which the note was given—and using the note as evidence rather than as the foundation of the claim—may have lawful interest on the sum due him, although by note given on a settlement the party sued may have promised to pay unlawful interest and such as the law of the State where the note was given visits with a forfeiture of all interest whatever.

Statement of the case.

5. Where usury is not set up in some way as a defence below, it cannot be urged here.

ERROR to the Circuit Court for the Eastern District of Louisiana; the case being thus:

By the Civil Code of Louisiana it is enacted—

1. That actions "for the delivery of merchandise or other effects shipped on board any kind of vessel . . . . are prescribed by one year."

2. That conventional interest shall in no case exceed eight per cent., under pain of forfeiture of the entire interest so contracted.

With these provisions in force, Nixon sued Newell, attaching as his property the steamboat Hill; and setting forth by petition *filed April 20th*, 1857:

1. That Newell was indebted to him $2585, with interest from January 11th, 1855, at the rate of eight per cent., for this, to wit, that on the said day the said Newell and one Hamilton, since deceased, being co-owners of the steamboat Hill, . . . and in such capacity, viz., as owners, made their note in his favor for the above-named sum, which would appear by reference to the note annexed and made part of the petition.

2. That independently of this, Newell was indebted in the same sum for this—that he, Nixon, had shipped, at New Orleans, on the said steamboat, of which Newell and one *Hamilton* were owners, a large quantity of salt, which was never delivered at its destination.

The note, which was annexed to the petition, was for the amount above stated, and was signed "Newell & Hamilton, owners," but was made payable with interest at the rate of *ten per cent. per annum.*

Newell set up as defence that he never was a member of any firm known as Newell & Hamilton; and that no person had authority to bind him under any such signature; and, moreover, that the cause was barred by the "prescription" (or "limitation," as it is called in many States), of one year.

The court found as fact that the note was not signed by

the defendant, Newell, but by Hamilton, now dead; that these two persons had no commercial partnership; that they did not transact the business of the boat under a social name, and were not accustomed to sign notes in this form; but that they were simply part owners in the Hill—Newell owning three-fourths and Hamilton one.

The court found, further (no bill of lading being produced and the evidence being of witnesses who received the salt), that the salt was shipped as alleged but arrived at an intermediate port in bad condition, where it was taken by the agent of the owners of the Hill, who disposed of the same with their consent and for their account, the plaintiff having refused to receive it on account of its bad condition; that the consideration of the note was the sum due by the steamboat and owners for the salt not delivered; that the defendant was aware of the making of the note and of its consideration; that there was no evidence of his dissent from the act. It was shown also that after the death of Hamilton, his administrator made a settlement with Nixon and transferred to him Hamilton's interest in the steamboat, for which Nixon had agreed to pay "the debts and liabilities of the boat." *This settlement took place September 22d*, 1856.

The objections made below to the claim were:

1. That the defendant, Newell, not having been in any sense a partner of Hamilton, the note signed by Hamilton did not bind Newell.

2. That no bill of lading had been produced; and that one was necessary.

3. That the suit was barred by prescription or limitation of one year.

The court (Campbell, J.), as to the first point, admitted that as Newell was not a partner, in any sense, of Hamilton, the note could not bind Newell, unless he was connected with it by testimony other than itself. But it thought that the special facts of the case did so connect and make him liable. The term "boat," in the contract by which Newell assumed to pay "the debts and liabilities of the boat," the learned judge considered as meaning those binding the

owners on account of their interest in the boat. The assumption had been made on an adequate consideration. The note on its face expressed an obligation affecting the boat, and it was given in recognition of such a liability.

In regard to the second point, the learned judge did not consider the production of the bill of lading essential to the support of the action. The suit had not been brought on the contract of shipment, but to collect the sum acknowledged to be due in consequence of the breach of contract.

3. To the argument of prescription the court said nothing.

Judgment having been given accordingly, for the plaintiff, the same points were again presented here on exception; an additional point being made, to wit, that the court erred in allowing eight per cent. interest.

Mr. Reverdy Johnson, who filed a brief of Mr. Marr, for the plaintiff in error:

1. As there was no commercial partnership between the defendant and Hamilton, and as they did not transact the business of the boat under a social name, Newell was not bound by the note, and, if he was liable to plaintiff, that liability must rest solely upon the original consideration, the shipment, consignment, and breach set forth in the petition. The note itself proved nothing against the defendant; and the plaintiff was bound to prove such facts as would constitute legal responsibility on the part of defendant; that is to say, was bound to prove the shipment, the consignment, the breach, and consequent damages, exactly as if no such note had been given. He did not do this.

2. The bill of lading was not produced; an extraordinary fact in the case of any large shipment. Nor does the plaintiff allege that he was the owner of the salt. In the absence of proof to the contrary, the consignee would be presumed to be the owner. The legal title is in him; and the mere shipper has no interest in the contract of affreightment, or in the delivery of the cargo. If the defendant was liable to the plaintiff, it was as a common carrier, for the damages resulting from the breach of the specific contract alleged.

Argument for the plaintiff in error.

The best proof of that contract would have been the bill; and without in some way accounting for the failure to produce it, the plaintiff ought not to have been allowed to introduce secondary and oral proof of the shipment. His character as shipper does not give him such an interest in the property as to enable him, upon that mere allegation, to maintain an action. The consignee might sue and recover upon simply alleging and proving the consignment to him, and failure to deliver; but if the shipper sues, he must allege and prove property in himself. This court may well presume, in the absence of a contrary showing, that every important allegation has been proven to the satisfaction of the triers, when there is a general finding in favor of plaintiff; but it will certainly not presume in favor of plaintiff, that an important fact, essential to his right to recover, which he has not alleged, was proven.

3. As there was no proof of demand having been made of defendant, and no pretence that he ever acknowledged his liability to plaintiff on this claim, there is nothing to take it out of the prescription; and the demand was barred.

4. The court below erred in allowing eight per cent. interest, even if the proof makes out the liability of the defendant.

The suit was upon the note, and one of two things is true in the matter. Either the note is obligatory upon Newell; and in that event it is void, so far as interest is concerned, because it stipulates for ten per cent.; or, it is not obligatory on him; and in that event there is no proof of a written agreement, or of any other agreement to pay conventional interest. Either there is no proof of an agreement to pay interest, or there is proof of an agreement to pay usurious interest, which is prohibited by the law of Louisiana.

In *Reid* v. *Duncan*,* the Louisiana courts say, in reference to the law against usury: "The statute is prohibitory. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.† The

* 1 Annual, 267.

† Civil Code, Art. 12.

agreement to pay usurious interest being in violation of a prohibitory law, we can give it no effect whatever."

This case arose and was decided under Art. 2895 of the Civil Code, which affixed no penalty to the agreement to pay usurious interest. But the law applicable in this case, attaches as a penalty the forfeiture of the entire interest so contracted. So utterly void is such an agreement, under this statute, that the debtor, if he has actually paid the usurious interest, may sue for and recover it within twelve months.*

Without written proof of an agreement to pay it, conventional interest cannot be recovered. An agreement to pay ten per cent. cannot be maintained as a valid contract to pay eight per cent. If the written proof establishes an agreement prohibited by law, the court can give it no effect whatever, but must declare it void *in toto*. In *Reid* v. *Duncan*, already cited, the court say: "We cannot say that we will let the convention stand up to the highest limit permitted by the law, and disregard it for so much as it exceeds the legal limit. The convention is a whole, and the nullity covers the whole."

Will it be said that there was no plea of usury in this case? That is so, and it is so for two reasons: 1st. Newell did not admit that the note was obligatory upon him; consequently he could not have pleaded that he had made an agreement to pay usurious interest. 2d. As the note itself, which is the only agreement touching interest, was exhibited as part of the petition, and offered in evidence, it furnishes proof of a stipulation which the law prohibits, and which the courts must reprobate. If the note were obligatory upon Newell the case would be exactly analogous, so far as the interest is concerned, to one in which a note offered in evidence should state upon its face that it is given for money lost at play. The proof of indebtedness disclosing an agreement which the courts cannot enforce, no special plea of illegality would be necessary.

* See a full comment on this statute in Lalande *v.* Breaux, 5 Annual, 506, *et seq.*

Argument for the defendant in error.

Mr. Janin, contra:

I. It is submitted that under the state of facts found by the court below, a sufficient partnership to bind Newell, even if not a truly commercial partnership did exist between Newell and Hamilton, under the laws of Louisiana. They were partners in the ownership and business of the steamboat. If so, they were bound jointly and severally for this debt, and the settlement of the claim by the note now sued on, by one of the partners, cannot, under the facts of the case, be complained of by the other partner.

But more clear is the fact, that the owners of the boat, Newell and Hamilton, acknowledging their liability, took the salt and disposed of it on their own account, and therefore, not only as carriers, but by appropriating the property to their own use, with the evident intention of indemnifying the owner, became responsible for the value of the property.

Express sanction was not wanting in this case on the part of Newell. The agent of the boat sold this damaged salt, *with the consent of both of the owners of the boat, and for their account;* Newell was aware of the making of the note, and the consideration for which it was given, and never objected to Nixon's claim; and, further, after Hamilton's death, in August, 1855, Hamilton's administrator transferred to him Hamilton's fourth interest in the boat and its benefits, in consequence of which Newell assumed to pay all the debts and liabilities of the boat. This includes, of course, the note sued on, which, on its face, expresses an obligation affecting the boat; and the evidence is that it was given in recognition of such a liability.

By this assumption the plaintiff in error became bound for the debt, even if he had not been originally bound by the note. Article 1884 of the Civil Code of Louisiana is in these words:

"A person may also, in his own name, make some advantage to a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of this advantage, stipulated in his favor, the contract cannot be revoked."

II. The counsel contend that the defendant in error was a mere shipper, and did not prove the ownership of the salt. This was, however, acknowledged by the settlement of Hamilton with Nixon, treating him as the party in interest.

III. As to the plea of prescription. The owners appropriated the proceeds of our salt. The action is less for a breach of contract to carry than *assumpsit* for money had and received. It is so plain that the prescription of one year for the mere non-delivery of merchandise cannot apply, that the court thought it needless to make any remark about the thing at all. And so it was. After Hamilton's direct acknowledgment of ownership and Newell's tacit assent to the settlement, it was certainly unnecessary to produce the bill of lading.

IV. The allowance of eight per cent. interest on the principal of the note was right. The suit was perhaps less upon the note than on the appropriation and use of our money, the proceeds of the salt sold. We asked eight per cent. interest, and no objection being made, it was given us. This was probably right.

But whether right or not, it must now stand. Objection to it is now first made here. There was no plea of usury, nor was usury set up even by argument in the Circuit Court, from which the case comes.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment was rendered for the plaintiff in the court below, and the defendant in that court excepted and sued out this writ of error. Cause of action, as stated by the plaintiff in his original petition, was that the defendant, Thomas H. Newell, was justly indebted to him in the full sum of two thousand five hundred and eighty-seven dollars and eighty-five cents, with interest thereon from the eleventh day of January, 1855, until paid, at the rate of eight per cent. per annum. He also alleged that the defendant, together with one Thomas Hamilton, deceased, as the owners of a certain steamboat engaged in carrying freight and passengers for

hire on the same eleventh day of January, made and executed to him their note for that sum, payable one day after date, with interest thereon at the rate of ten per cent. per annum from the date of the note, which was annexed to and made part of the petition. In his supplemental petition the plaintiff alleged that during the month of June, 1854, he shipped on board the steamer aforesaid, of which the defendant and the said Thomas Hamilton were the owners, four thousand seven hundred and sixteen sacks of salt, to be transported to Nashville, and there to be delivered to certain consignees, and that a large part of the shipment, to wit, two thousand four hundred and six sacks of the salt were never so transported and delivered: and he averred that he was entitled to recover for the value of the deficit, and that the note annexed to the original petition and signed "Newell and Hamilton, owners," was given by them for that consideration.

Service was made by attachment, as the defendant resided permanently out of the State, and the writ of attachment was duly served on the aforesaid steamboat, then lying in the port of New Orleans. Due return having been made by the sheriff, the defendant appeared in the case, and on his motion the property attached was discharged, he having given bond to satisfy such judgment as might be rendered against him in the suit. All these proceedings took place in the Fifth District Court of New Orleans, but the cause was shortly afterwards, on motion of the defendant, removed into the Circuit Court of the United States for that district, under the twelfth section of the Judiciary Act.

Principal defences, as pleaded in the original and supplemental answers of the defendant, were: 1. A general denial of all the allegations of the petition. 2. That the defendant never was a member of a firm or partnership called Newell & Hamilton, and that no person ever had power or authority to bind him by note or otherwise under that name or style. 3. That the supposed cause of action accrued more than one year prior to the institution of the suit, and that the same was barred by the prescription of one year.

Opinion of the court.

1. Testimony was taken, and the cause was submitted to the court without the intervention of a jury. Although there was no jury trial, still the rulings of the court, under the peculiar practice in the Louisiana district, may be examined in this court upon writ of error, and the judgment reversed or affirmed by a bill of exceptions, in the same manner as if there had been a jury trial. They may also be revised here upon a state of facts found by the court, but the question presented in the court below and decided by the court must be clearly stated.*

Applying that rule to the present case, it is clear that no questions are properly before the court in this case except such as are distinctly presented in the bill of exceptions. Recurring to that source, it appears that the court found from the evidence that the steamer which carried the freight was commanded by the defendant, and that he owned three-fourths part of her, and that Thomas Hamilton (since deceased), owned the remaining one-fourth; that they were not partners, and never had any partnership name for transacting the business of their steamboat, and were not accustomed to sign bills or notes for each other, but that each signed for himself whenever it was necessary to give securities concerning the business of the boat, and that the note annexed to the original petition was not in the handwriting of the defendant. Full proof, however, was introduced that the consideration of the note was the balance due by the steamboat and owners for the salt not delivered to the plaintiff, and that the defendant was aware of the making of the note and of the consideration for which it was given.

2. Second objection of the defendant under the general issue was that the plaintiff could not recover upon the consideration stated in the petition, because the bill of lading was not produced; but the court ruled that the suit was not brought on that instrument: that it was a suit to collect the sum acknowledged to be due to the plaintiff in consequence of the breach of the contract. Undoubtedly that ruling was

* Arthurs et al. *v.* Hart, 17 Howard, 15.

correct, as is obvious from the allegations of both petitions. They allege the consideration of the note as the cause of action, rather than the note itself, and the judgment of the court very properly followed the declaration or petition. Reference is made in the bill of exceptions to the note and the testimony in support of it rather as evidence of the amount due to the plaintiff than as the foundation of the suit.

3. But the plaintiff in error still relies upon the plea of prescription, and insists that the action was barred by that limitation. Nothing is said upon that subject in the opinion of the court, but inasmuch as that defence was set up in the answer, and is mentioned in the bill of exceptions as one of the objections taken by the defendant to the right of the plaintiff to recover, we think the point is properly open to review in this court. Hamilton gave the note in liquidation of the demand of the plaintiff, and the bill of exceptions states that the defendant had notice of it before the death of Hamilton, who died in August, 1855. After the death of Hamilton his administrator made a settlement with the defendant, and transferred to him the one-fourth of the steamboat which belonged to his intestate, and in consideration of that transfer the defendant assumed and agreed to pay all the debts due by the boat. Express statement of the bill of exceptions is that that settlement took place on the twenty-second day of September, 1856, and that the cause of action in this case was included in that settlement. Viewing the matter in that light, the court held that the promise of the defendant to the administrator of the deceased part owner enured to the benefit of the plaintiff, and inasmuch as it was within the year next preceding the commencement of the suit, it was doubtless the conclusion of the court that the plea of prescription was not maintained. Suggestion of the defendant, however, is that there was no satisfactory proof of the acknowledgment of the specific amount stated in the petition, but the statement in the bill of exceptions is substantially otherwise, and we think the statement was fully warranted by the pleadings and evi

dence. Assuming the facts to be so, then it is clear that the plea of prescription is not maintained, as the petition was filed on the twentieth day of April, 1857, less than one year after the settlement was made.

4. Remaining objection of the present plaintiff, the defendant below, is that the court erred in allowing eight per cent. interest. Legal interest in Louisiana is fixed at five per cent., and the legislature has provided that "conventional interest shall in no case exceed eight per cent., under pain of forfeiture of the entire interest so contracted." Theory of the plaintiff in error is that the judgment was rendered upon the note, and that inasmuch as the note stipulated for the payment of ten per cent., the entire interest was forfeited. Present defendant denies that theory, and we think it cannot be sustained for the reasons already given. Judgment was rendered on the cause of action stated in the petition, as before explained, and not on the note, as assumed by the present plaintiff. Conventional interest might be eight per cent., and as the petition claimed no more, and no more was allowed by the court, the presumption, in the absence of proof to the contrary and of any exception to the decision of the court, is that the judgment is correct. Such a question might have been presented in the finding of the court, or it might have been presented in the bill of exceptions on objection to the ruling of the court. But usury was not set up, either in the original or supplemental answers, and it does not appear that any such objection was made in the court below. Parties might lawfully agree that the rate of interest should be eight per cent., and inasmuch as that rate was demanded in the petition and was allowed by the court, and no objection was taken to the ruling of the court, it must be presumed in this court, under the state of the pleadings exhibited in the record, that the court decided correctly.

The decree of the Circuit Court is therefore

AFFIRMED, WITH COSTS.