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the proper process of the court, it shall be placed in the custody of the marshal of the district.

When, therefore, in this case, the prize commissioners certified to the court below that the prize steamer Nassau had arrived in the District of New York, and was delivered into their hands, there was sufficient evidence before the court that the vessel was claimed as prize of war, and in the jurisdiction of a prize court; and the motion to dismiss this libel, filed by private parties, was properly entertained and decided.

Whether a maritime lien, like the one in this case, is lost, when the property is captured *jure belli*, would have been a proper question for investigation and decision by the prize court that condemned the Nassau, and which the libellants, on presentation to that tribunal, could have had decided.

Not having done so, the question is not before this court for review.

The decree of the Circuit Court is

AFFIRMED

UNITED STATES v. LE BARON.

1. When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day.
2. If it be proved that a bond bearing date the first day of the month, did not become obligatory until the fifteenth, this is no variance, although the bond is counted on in the pleadings as a contract made on the first day of the month and bearing that date.

ERROR to the Circuit Court for the Southern District of Alabama.

This was an action of debt brought by the United States against Le Baron, surety of Beers, deputy postmaster at Mobile, on an official bond, dated *the first of July, 1850*.

The declaration set out—

“For that whereas, heretofore, to wit, *on the first day of July, A. D. 1850*, at Mobile, to wit, in the State aforesaid and within

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the jurisdiction of this court, the said Le Baron, by his certain writing obligatory sealed with his seal, &c., *acknowledged himself* to be held and firmly bound to the United States in the sum of \$20,000."

The assignments of the breaches were laid in these words:

"That while the said Beers was deputy postmaster as aforesaid under *said* writing obligatory, and after the making and delivery thereof, to wit, on the 10th day of July aforesaid, and divers other days before the commencement of the suit," &c.

The case had been already before this court at December Term, 1856, and is reported in 19 Howard.* The facts then thus appeared:

Beers was appointed deputy postmaster at Mobile by the President during the recess of the Senate, and received a commission bearing date in April, 1849, to continue in force until the end of the next session of the Senate, that is to say until the 30th of September, 1850.

In April, 1850, before the old term had expired, he was nominated by the President to the Senate for the same office; and the nomination having been confirmed, a commission was made out and signed by President Taylor, but the President dying, it had not been transmitted to him at the date of the bond, July 1st. The condition of the bond was simply that whereas Beers was "deputy postmaster at Mobile," "now, if he should well and truly execute the duties of the said office," the bond should be void. There was nothing therefore in the bond to show to which term of office it meant to apply; whether to the earlier one which underlaid the second, or to the second which overlapped partially the first. The default assigned as a breach of the bond was admitted to have occurred under the second appointment; and the principal question on the writ of error then before this court, was, whether the bond secured the faithful performance of the duties of the office under the first or under the second appointment.

* Page 73.

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The third plea of the defendant alleged that from the 1st July until the 30th September, Beers was deputy postmaster, under an Executive appointment, made by the President during the recess of Congress, and that the bond sued on was intended to apply to that appointment and to that term alone, and that during that term no default had occurred. The replication was "that on and after the delivery by the defendant of the bond aforesaid, to wit, on the 1st day of July," and from thenceforward for four years, Beers held under the appointment confirmed by the Senate, and that the bond was made for the faithful discharge of duty under *this* appointment—the last one. The rejoinder was, that "at the time of the execution of the bond," Beers was not postmaster under the appointment set forth in the replication, but under the Executive appointment—and that the bond secured the performance of duty only during the time mentioned in the plea. Issue was joined on this rejoinder of the defendant.

The court held that the bond being an official and statutory bond, spoke, not like ordinary bonds, from its date, but from the time when it reached the Postmaster-General and was accepted by him. The judgment was reversed and a *venire de novo* awarded.

On a subsequent trial it was proved that the bond was accepted July 15th. Thereupon the Circuit Court instructed the jury that if the bond given in evidence was not approved until July 15th, 1850, there was a variance between the allegation and the proof. And a verdict having gone accordingly for the defendant, the instruction just mentioned was the chief matter now assigned as error. A few exceptions to the admission of evidence also appeared upon the record.

Messrs. Reverdy Johnson, E. S. Dargan, and G. N. Stewart, for the defendants in error:

The substance of the issue was, whether Beers was, *on the first day of July, 1850*, deputy postmaster under his appointment confirmed by the Senate. Whether he was or not, depended on the question whether the bond was accepted

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on that day, and thus became a perfect obligation on the said first day. The proof showing that the bond was not accepted until the 15th, there could, under the decision in 19th Howard, when the case was here before, be no other instructions given than were given by the court. The declaration *described* one bond and *proved* another.

Suppose that the pleader had in his replication alleged the true day on which the bond was accepted, and the office, to which it was intended to apply, vested, that is to say that he had alleged in his replication that the bond was accepted by the Postmaster-General on the 15th of July, 1850; this replication would have been a clear departure from the declaration, which described a bond operative from the first of that month.

In *Hall v. Matthew Denbigh and others*, reported so far back as Croke Elizabeth,* the declaration described a deed as bearing date the first of November (39 Eliz.), but did not aver when it was *delivered*. After judgment, there was a motion in arrest of judgment, because it was not averred when the deed was delivered: after several arguments, the court said the declaration was well enough, because it must be intended that the deed was delivered on the day of its date, and further, if it had been delivered on a subsequent day, and so averred in the replication, this would have been a departure.

The later case of *Williams v. Jones*,† is to the same effect and in principle similar to ours. The declaration in our case describes a bond dated the 1st July. By implication, this means delivery on that day. A delivery on another day may be proved, it is true, by parol, because as this court has decided in regard to this particular bond, there is a case of exception to the general rule, and such proof is held not to contradict the instrument;‡ but when it is proved, the bond is varied, and no longer conforms to the bond described nor to the profert, and is therefore fatally variant from both.

* Page 773.

† 5 Barnwell and Cresswell, 108

‡ 19 Howard, 78.

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It is true that the replication to the third plea asserts that the bond was made for the proper discharge of the duties of the second office, and the rejoinder says it applied to and covered only the time set forth in the plea, and no other. But these are only the legal conclusions of the pleaders, and not averments of fact. These allegations are not traversable nor issuable, involve questions of law only depending on the facts alleged and proved, which alone can determine the duties involved by the contract. These assertions, then, on both sides, are wholly immaterial.*

The plaintiff undertook, therefore, by his pleadings, to establish before the jury four propositions: 1. That the bond was made and delivered on the 1st of July, 1850, and was operative from that day. 2. That Beers was in office on that day under the second appointment. 3. That the senatorial term of office, or second term, embraced the time as early as the 1st July, 1850. 4. That as a consequence the defendant was liable for moneys received by the postmaster on the 1st and 10th of July, 1850.

But with the admitted fact that the bond was not accepted till July 15th, and the decision when the case was here before, that it operated but from that day, he undertook an impossibility.

Mr. Ashton, Assistant Attorney-General, for the plaintiff in error:

The bond given in evidence sustained the declaration. The time of the making it is laid under a *videlicet*. It was not, therefore, necessary to prove it as averred.† Though a deed takes effect only from its delivery, yet the delivery need not be stated in pleading.‡ A plaintiff may reply or show in evidence that a deed was really made on a different day from that of its date as stated in the body of it.§

In the plaintiff's replication to the third plea the time of

* Gould on Pleading, 183, § 29.

† *McDade v. The State*, 20 Alabama, 81.

‡ *Tompkins v. Corwin*, 9 Cowen, 255.

§ *Serle v. Darford*, 1 Lord Raymond, 120.

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the making and delivery of the bond are laid under a *videlicet*.

The issue was joined on the rejoinder of the defendant to this replication. The rejoinder was: "That *at the time of the execution*" of the bond "Beers was not postmaster in the manner and for the term of office set forth in the replication, but was postmaster by Presidential appointment."

The *execution* of the bond included its signing, sealing, and delivery.* The *making* of the bond would seem to be the writing of it.† This rejoinder, then, tendered the substantial issue in the case, and upon that the parties went to trial.

The former decision of this court covers the merits of the case now.

Mr. Justice MILLER delivered the opinion of the court.

It was decided, when this case was in this court before, that the bond, which is the foundation of the suit, was obligatory from the time of its acceptance by the Postmaster-General, and not from its date; and also that the term of office of Beers commenced, under his appointment, by and with the advice and consent of the Senate, on the day of that acceptance.

The case having been remitted to the Circuit Court for a new trial, that court directed a verdict for the defendant, on the ground that there was a variance between the bond offered in evidence and the one set out in the pleadings. The variance is supposed to have reference to the time the bond took effect. It is claimed that the bond is described as being dated and taking effect on the 1st day of July, 1850, whereas the evidence showed, that while it bore that date on its face, it was not approved by the Postmaster-General until the fifteenth day of that month, and, therefore, under the decision in 19th Howard, did not become the bond of defendant until the last-mentioned date.

* Burrill's Law Dictionary, tit. "Execution."

† Hall v. Cazenave, 4 East, 481.

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Upon an examination of the declaration, it will be seen that the plaintiff declares on the bond, according to its legal effect, namely, that on July 1st, 1850, the defendant, by his certain writing obligatory, acknowledged himself indebted to the plaintiff in the sum of \$20,000. This manner of declaring gives no date to the bond, and merely gives the time when defendant became bound by it to the plaintiff. The rule that allegations of time, quantity, value, &c., need not be proved with precision, but that a very large departure from the time, quantity, &c., alleged, is allowable, is so well understood, and is so much a matter of every-day practice, that no citation of authority to sustain it is necessary. An indictment charging a prisoner with murder on the first day of July would be sustained by proving a murder committed on the fifteenth of that month. How much more reasonable that a contract alleged to have been made on the first, may be supported by evidence of the same contract made on the fifteenth of the month?

But it is also a rule of evidence that when words used in a declaration are *descriptive* of the instrument declared on, it must, when offered in evidence, conform strictly to that description; and we concede that if it is alleged as part of the description of such an instrument that it bears such a date, or is dated of such a day, that no instrument will be admissible which does not bear that date.

It is said by counsel that this declaration gives such a description of the date of the bond. A careful examination of it, however, shows no attempt at such description, and merely the usual necessary allegation of the time when the contract was made. If, however, counsel are correct in their construction of the declaration, still there is no variance, because the bond read in evidence actually bears the date which it is claimed that the declaration ascribes to it, and it therefore conforms to the supposed description.

It is no variance, however, from the substance of the issue to show that, though dated the first of July, it took effect only on the fifteenth, because, as we have already shown

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the precise time when the contract became obligatory need not be proved on trial.

The attempt to show that, by the pleadings subsequent to the declaration, it became necessary to prove that the contract became obligatory on the very day alleged, is equally unsuccessful.

The defendant, by his third plea, alleges that from July 1st to September 30th his principal was deputy postmaster, under an appointment not confirmed by the Senate, and that the bond sued on was applicable to this appointment and to this period alone, and that during that time no default or breach of its condition occurred. The replication is, that on the day of the date of the bond, and from thenceforward for four years, Beers, the deputy postmaster, held under the appointment confirmed by the Senate, and that the bond covered his transactions during that time. To this defendant rejoined that Beers was not postmaster under the appointment set forth in the replication, but under the first—a Presidential appointment—and that the bond covered only the time mentioned in the plea.

As it was proved on the trial that the bond was accepted on the 15th July, 1850, it follows, under the former decision of this court, that from that time forth the bond covered his liability, and that it was under the last appointment. The plea of the defendant fails, therefore, except as to the time between the first and fifteenth of July. It is not perceived how the precise day when the bond took effect is material otherwise than this, and the court, by refusing to permit any breach to be proved within those fifteen days, would have fully protected the defendant.

All these pleas have relation to the legal effect of the bond, and none of them *describe* a bond different from the one offered in evidence. After the day had been fixed by proof at which the contract became binding, it was material that no breach should be proved before that time; but the proof which fixed that date was no variance from any pleading of the plaintiff, nor from the substance of any issue made in the case.

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As these principles require a reversal of the case, it is not deemed necessary to notice the other exceptions, which are unimportant, and may not arise on a new trial.

JUDGMENT REVERSED.

RAILROAD COMPANY v. LINDSAY.

1. The article 3499 of the Civil Code of Louisiana, which prescribes that "actions for the payment of freight of ships and other vessels are prescribed by one year," does not apply to a case where the plaintiffs were shipbrokers only and not shipowners, and where the contract was not one of affreightment.
2. A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to the time or place of delivery, yet with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties.
3. Where none of the evidence offered by a plaintiff is objected to below, and no exception taken to the findings of the court there, objection cannot be made in this court.
4. An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained.
5. Such case comes within the thirty-second section of the Judiciary Act, curing imperfections, defects, or want of form in the pleadings or course of proceedings, except such are specially demurred to.

LINDSAY & Co., *ship-brokers*, of London, filed their petition in the Circuit Court for the Eastern District of Louisiana, in which—alleging a written contract between themselves and the New Orleans, &c., Railroad Company, the company bound itself to pay them "freights," at the rate of 25s. per ton, "in consideration of freightage to be furnished to Algiers, opposite New Orleans, for certain iron rails," &c.—they averred that, in pursuance of the aforesaid contract, they did furnish freightage for several thousand tons of such rails, from Wales to Louisiana, and that the balance of the freight upon the rails due them was \$18,000, &c.