who were complainants in the court below. *They* had appealed from the original decree of foreclosure, on the ground that it did not include certain property which they were entitled to have sold under the mortgage. Upon the questions involved in that appeal, the members of the court who heard the argument—which was by the same counsel as the appeal by the other side, their positions only as respected appellant and appellee being reversed—were equally divided in opinion, and the decree and orders complained of were therefore affirmed.

THOMPSON *v.* RIGGS.

1. The eighth section of the act of Congress of 1863 (12 Stat. at Large, 764) to reorganize the courts of the District of Columbia, and which says "that if, upon the trial of the cause, an exception be taken, the bill containing it need not be sealed or signed," does not dispense with a regular bill of exceptions in the way usual in Circuit Courts of the United States when the rulings of the court, in admitting or rejecting evidence, or in giving or refusing instructions, are meant to be brought from the Supreme Court of the District to *this* court for review. The provision has reference to carrying such rulings from the special to the general term of the Supreme Court of the District itself.—*Pomeroy's Lessee* v. *Bank of Indiana* (1 Wallace, 602), approved.
2. A customer of certain bankers at Washington, D. C., in times when, specie payments having been lately suspended, coin was acquiring one value and currency (paper money) another and less, deposited with them both coin and paper money; the different deposits being entered in his pass-book, the one as "coin" the other as "currency," &c. Debts being at this time payable by law only in coin, the bankers requested their customer to make his full balance coin, which he did. Congress passed, about eight months afterwards, an act making certain treasury notes lawful money for the payment of debts. The depositor went on depositing "coin," and "treasury notes" then regarded as currency, and both were entered accordingly. He afterwards drew for "coin," for a part of his deposit, exceeding the coin deposited *after* the legal tender act, and his check was paid in coin. He afterwards drew for "coin,"—the bulk of his coin balance deposited *before* the legal tender act. Coin was refused and tender made of the notes declared by Congress a legal tender. On suit brought to recover the market value of the coin drawn for—the bank teller having testified among other things that "after the suspension, and particularly after the act making treasury notes a legal tender, his employers uniformly made with customers depositing with them a difference, in receiving and paying their

deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise they paid currency, treasury or bank notes"—the plaintiff offered evidence to show "that the usage and mode of dealing between the said parties as set out in the testimony of the teller was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers"—

Held, that the evidence was rightly excluded.

ERROR to the Supreme Court of the District of Columbia.

Riggs & Co. were bankers in the District of Columbia: Thompson was a business man there, keeping a bank account with them, depositing specie, treasury notes, bank notes, bills for collection, in the ordinary way of bank customers. Prior to April, 1861, no distinction apparently had been made in the mode of entering, in his pass-book, credits of coin and credits of current bank notes, then payable throughout the country in coin, on demand. All kinds of money deposited had been entered in the pass-books alike. In April, 1861, the banks generally suspended specie payments, and a difference between the value of coin and of bank notes, or "current funds," as these were called, began to show itself, becoming by degrees, for some time, greater. Riggs & Co., at that date, began to make a difference in receiving and paying deposits, paying in coin when the deposit was made in coin, and in currency when made in currency. On the 18th June, 1861, Thompson had made deposits—

Coin, ...	$2,920 09
Currency, ...	2,463 50
	$5,383 59

On that day Riggs & Co. required him to make his full balance specie, which was done by his drawing a check, payable in currency, and depositing the check of another customer of the bank, payable in coin, for a like sum, and which was received and credited by the bank as specie. On the 3d of September, 1861, Thompson drew another check on the bank for $1000, payable in currency, and at the same time deposited a check, drawn by the same customer, in like

manner, payable in specie, for $1000, which was credited as cash.

Afterwards, in like manner, Thompson, from time to time, deposited with Riggs & Co. other checks, drawn on them by the same customer, payable in specie, some of which were credited as coin, and others as cash, to an amount exceeding $1600.

An extract from the bank book shows the exact form of entries between June 18, 1861, and the 25th of February, 1862.

Cr.			Dr.		
1861.			1861.		
June 18.	To bal. ($2,463\frac{50}{100}$ *cur.*), . . .	$5,383 59	June 22	By check, No. 1213, . . .	$1,463 50
June 24.	Coin, . . .	1,463 50	July 1.	By prot. Stevens,	1 75
July 5.	Cash, . . .	88 75	Sept. 3.	Check, No. 1214,	1,000 00
Aug. 3.	Do., ...	105 00		Balance, . .	5,761 73
Aug. 17.	Do., ...	80 54			$8,226 98
Aug. 31.	Do., ...	105 60			
Sept. 3.	Do., ...	1,000 00			
		$8,226 98			
1861.					
Sept. 3.	To balance, .	$5,761 73			
Sept. 14.	To cash, . .	127 71			
Sept. 5.	To King, . .	50 00			
Sept. 21.	To cash, . .	22 00			
Oct. 5.	Do., ...	153 23			
Oct. 19.	Do., ...	483 20			
Oct. 5.	To King, . .	50 00			
Nov. 23.	To cash, . .	92 10			
Dec. 7.	Do., ...	136 34			
Dec. 21.	Do., ...	140 00			
Jan. 4.	To *treasury notes*,	119 41			
Jan. 11.	To coin, . . .	74 72			
Jan. 25.	Do., ...	120 36			
Feb. 8.	Do., ...	127 11			
Feb. 20.	To Gideon. .	197 05			
		$7,724 96			

On the 25th February, 1862, above mentioned, Congress passed an act authorizing the issue of notes of the United States, which notes, the act declared, should be "*lawful*

money and a legal tender in payment of all debts, public and private," except duties, and interest on the national debt.

The entries of credits in the pass-book, after the said 25th, were thus:

1862.		
Feb. 25.	To balance, ...	$7,724 96
M'ch 1.	To T. notes, ...	158 51
M'ch 8.	Do., ...	41 00
M'ch 15.	To coin, ...	71 94
M'ch 22.	To coin, ...	65 34

On the 8th May, 1863, Thompson drew for $750 coin; more than the amount deposited *after* the passage of the legal tender law. This was paid in coin.

On the 23d of February, 1864, he drew for $6600 "coin." Riggs & Co. made a tender of notes created by the act of Congress. These were declined, and assumpsit brought in the Supreme Court of the District of Columbia to recover a sum of money equal to the just commercial value of $6600 in gold coin; a value, on the day of the draft, of $157 for every $100 of the notes tendered; and, on the day of the suit, of about $200 for each such $100.

The declaration had four counts—

Two on an alleged custom of bankers in Washington, to receive gold and silver coin, bank and other notes on deposit, keeping separate entries of the character of the deposit, and to respond to the checks drawn upon them in kind; to pay coin for deposits in coin, and notes for deposits in notes, and that the plaintiffs so dealt with the defendants; and having a large balance to their credit, in February, 1864, in gold coin, they drew two checks for coin, payment of which was refused:

And two on a special agreement in substance the same as the usage above stated, arising in like manner.

Pleas: 1st. That the defendants did not promise as alleged. 2d. Tender of treasury notes made by Congress a legal tender in payment of debts.

On the trial, at special term, before Mr. Justice Wylie, the teller of Riggs & Co. testified thus:

Statement of the case.

"Prior to the suspension, the defendants paid all checks drawn upon them by their customers in gold or its equivalent, except when the deposit had been in Virginia or other depreciated paper, and then they paid in like kind. After the suspension, and particularly after the act of February 25, 1862, making treasury notes a legal tender, they uniformly made, with their customers depositing with them, a difference, in receiving and paying their deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin; otherwise they paid currency, treasury or bank notes."

On cross-examination, he said:

"After the suspension the defendants would no longer receive currency, then depreciated, as the equivalent of specie, as before; it continued to be received and credited to the customer, as appears by the books, *and went into the general funds of the bank;* the same money was never returned to the customer, and was not received on special deposit; *the plaintiffs never had made any special deposit with the defendants;* the books of the bank and the pass-books were kept as before the suspension, except *that the different deposits were designated by being marked, respectively, coin and currency.*"

"Thereupon the plaintiff offered to give evidence to show that the usage and mode of dealing between the said parties, as set out in the testimony of the telier, was uniformly used and practised by all the banks and bankers of the District of Columbia with their customers."

The record proceeded:

"Which last offered evidence, being objected to by defendants, is excluded by the court, and to said ruling of the court the plaintiff excepts in law, and prays the court to sign and seal this their first bill of exceptions, which is done accordingly, this eleventh day of June, 1864.

[SEAL.] "ANDREW WYLIE"

The Supreme Court of the District in which the action was brought, was created in 1863 by "An act to reorganize

the Courts of the District of Columbia." It is composed of four judges. A single justice holds what is called a "special term" (the *Nisi Prius*). Three justices hold the "general term," or ancient *Court in Banc*.

Any party aggrieved by a judgment of the court at special term, may appeal to the court at general term. The eighth section of the statute enacts:

"That if, upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions with so much of the evidence as may be material to the questions to be raised; *but such case or bill of exceptions need not be sealed or signed.*"

And the eleventh section says:

"Any final judgment, &c., may be re-examined in the Supreme Court of the United States, in the same cases and in *like manner*, as is now provided by law, in reference to final judgments, &c., of the Circuit Court of the United States for the District of Columbia."

In this last-named court, bills of exceptions had been in the old and usual form; that is to say, had been signed and sealed by the judge.

On the trial, both parties resting, the plaintiffs prayed the court to give certain instructions set out in the record—as "that, by the Constitution of the United States, no tender of the payment of a debt is good unless made in gold and silver coin, &c.," which the court refused to give; giving other instructions. And the record proceeded, *no judge's seal or signature* appearing:

"And to the said ruling of the court, as well as to refusing to give as to giving said instructions, the plaintiff excepts in law, and said exception and the evidence aforesaid *are hereby made record.*"

Verdict having gone for the defendant, the case was taken to the court at general term, and judgment entered finally for the defendant.

The case being now here on error, two questions arose:

1st. Whether in order to bring exceptions to this court from the court just named, it was necessary that they should be signed and sealed by the judge; a question, upon whose resolution, as it might be the affirmative or negative, depended the fact whether the instructions asked and given at the special term as to the constitutionality of the legal tender law had, or had not, got here for review.

2d. Whether the court had rightly refused the offer of proof that the usage and mode of dealing between the parties in this cause was uniformly used and practised by all banks and bankers in the District with their customers.

The first question was suggested here by this court.

Messrs. Bradley and Wilson, for the plaintiff in error:

I. Of course, independently of the act of Congress which organized the Supreme Court of the District, exceptions, in order to take up a case on error, must be signed and sealed by the judge. But that act, in its eighth section, dispenses with this ancient, cumbrous, and really quite useless formality. It declares in terms that if made part of the record (as they were here) bills of exception "need not be sealed or signed."

II. The instructions asked for, and those given, involving the constitutionality of the legal tender act, so far as it makes paper lawful money, are therefore before this court for adjudication. [The counsel then argued in support of the unconstitutionality of this provision of the legal tender act.]

III. The evidence of the usage ought to have been received.

In the latter part of 1861 it had become evident, as every one knows, that coin was ceasing to be the circulating medium of commerce, and was daily appreciating in value. There was a daily increasing difference between gold and silver, which, although a circulating medium, had an *intrinsic* value, and *currency*, which was merely the representative of value. Apprehending that this difference would continue and increase, it was quite natural for all parties dealing as

bankers and customers, to say the one to the other: "In our dealings we will, for our mutual benefit, distinguish coin from bank and other bills—both shall be returned in kind—gold we will repay with gold, the other we will repay in currency." Indeed, such agreements were made essential to commercial safety by the events that were then taking place. They were modifications of the usual relations between banker and customer, and adjustments to the exigencies of the times.

The natural inference, then, from the entries found in this pass-book, in such a state of the currency—never made in any pass-book in ordinary times and when gold is not at a premium—was that such had been the understanding here. The entries of themselves imported as much. As the short entry of numbers in the money columns signified not only that so many dollars had been deposited, but that so many dollars also were to be returned, so the most natural import of the words "coin" and "treasury notes," written at the same time and by one pen with, and in immediate juxtaposition to those numbers, meant not only that that "coin" or "treasury notes" had been deposited, but also that coin and treasury notes were to be paid. Especially was this the most natural meaning when coin was worth double of treasury notes. The words, indeed, in connection with the known state of the currency, could not well have any other meaning than that which we asserted, unless we suppose that a man deposits $6600 expecting when he calls for it—the next hour perhaps—to receive just $3300.

Even the testimony of Riggs & Co.'s teller, it may be remarked—though this is not important, for the whole matter was for the jury—is direct to the effect of the entries; for he states that with all their other customers Riggs & Co. uniformly paid coin or currency, as one or the other was deposited, and, of course, entered in the pass-book. Nor is this affected by his statement on cross-examination—that "the *same* money was never returned to the customer." Of course it was not. But only "the like kind" of money. It was not set up at all by Thompson that he had made a "spe-

cial deposit" in the law sense of that word. His money was not marked with an ear-mark, nor in a box or bag. Such deposits are but a charge to bankers. But in times when gold is undergoing fluctuations of value they want gold not the less on deposit. Going into the general funds of the bank, it is theirs. They use it as they do other deposits, viz., to lend out; and when gold is worth twice as much as currency to lend out at double the rates of currency. In other words, they borrow it as they do deposits of currency, to pay back on draft; not, of course, the identical pieces of gold but only the same number of dollars in gold coin; in both cases the deposit being in the nature of what the civil law calls a *mutuum*. The teller states that "the books of the bank and the pass-books were kept as before the suspension —*except* that the different deposits were designated as being marked respectively coin and currency." In the exception consists the basis of the claim. He says also that deposits of "currency" went into the general funds of the bank. But he does not say that deposits of gold ever went into the general mass of the "currency," or into the general mass of anything except of the gold itself.

The offer was, therefore, not to contradict or vary a contract, or even to supply an omission in it; but the form of it being very curt and *technical*—in the style of bankers—to explain it by showing in what way it was acted on universally by bankers and their customers in the District; a way, as the teller showed, in which it had been uniformly acted on by these same bankers with their customers generally. This was allowable. The uniform custom of banks in the District of Columbia constitutes a part of the contracts between bankers and depositors.* The offer, in fact, was in support of that which, apparently, formed and was the contract.

Neither was the evidence offered to vary general law. That, of course, cannot be done. But there is no law that when gold money is worth twice as much as paper money,

* Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 6th Am ed. 837; Keaner *v.* Bank of Columbia, 9 Wheaton, 582.

a man depositing gold money and paper money in the same bank may not agree that when he asks for gold money back he shall have it, to the extent of his deposit; being bound also when he has deposited but paper to take paper back.

Messrs. Carlisle & W. S. Cox, contra, for the bankers, defendants in error:

I. The objection suggested from the Bench, as to the absence of any proper bill of exceptions to raise the principal question, the question of constitutionality of the legal-tender act, seems to us well taken. We are instructed, however, to waive any such objection if it be competent for us to do so. The point is not made upon our brief. The argument in support of it may be briefly stated thus:

Final judgments in the Supreme Court of the District are to be examined here, not only in the same cases, but "in the same *manner*" as formerly. The provision in the eighth section dispensing with seals and signature had reference to appeals from the special term to the general term.

II. Accordingly no question as to *instructions* can arise here. The case then stands thus—of an act of Congress making certain notes a legal tender, of a tender in them, and of a refusal; there being no allegation in the court below, so far as appears here, that the law authorizing a tender in notes was not constitutional and of course binding on all. However, we are ready to argue the constitutional question. [The counsel then argued at length accordingly.]

III. To resolve the remaining question—the admissibility of the supposed usage—it is only necessary distinctly to understand the true state of facts upon which it arose.

This suit is not brought to recover a balance of deposits made in coin *after* the passage of the legal-tender act. All such deposits were repaid, and largely overpaid, in coin, on the check of May 8th, 1863, for $750. The balance sued for is that which the passage of the act found in the banker's hands, and which, if it were, as the law contemplates, used in banking, could thereafter only be recovered by the banker for his debtors, in legal-tender notes. The plaintiff's theory

is, that he had only to allow that balance to remain to his credit and thereafter make his demand for gold when the premium should be highest; thus compelling the banker, *nolens volens*, to be his broker, and to secure for him all the advantages, with none of the risks, of speculation upon the national currency. The check for $6600 was drawn upwards of two years after the passage of the act; and might with like supposed results have been delayed till gold was at 300. As there was no evidence tending to show that any of this balance was deposited after the passage of the legal-tender act, it was impertinent to offer proof of the usage where such deposits were made and received as coin. If the act was to have any operation or vitality at all, it must needs apply to bankers' balances due at its passage. Plainly, it was binding on the banker as to debts due him growing out of the legitimate use of the sums which had been so deposited. To apply it to his receiving hand, and not to his paying hand, would be absurd. The offer was, to defeat the statute by proof of a supposed usage. This was inadmissible.

Reply.—That the coin deposits were made before the tender act passed is unimportant. They were not made till after the distinction in value between coin and paper was established: ten months before the act. All loans made by Riggs & Co. in coin after April, 1861, were, in fact, paid in coin.

Mr. Justice CLIFFORD delivered the opinion of the court.

Substance of the declaration was that the defendants were bankers, exercising the trade and business of banking, and that the plaintiffs were their customers, and as such were in the habit of making their deposits at their bank, and that the defendants, as such bankers, were accustomed to receive as deposits gold and silver coin, and other money currency, of their customers, to be paid and returned in kind, agreeably to the custom of their bank and all other banks in the city of Washington; and that the plaintiffs, on the twenty-eighth day of February, 1864, having a balance due them at

the bank of the defendants, of five thousand seven hundred and sixty-one dollars, as deposits previously made there in gold and silver coin, demanded payment and return of the same, and that the defendants then and there refused to make such payment and return as they had promised to do.

Defendants pleaded the general issue, and that they, at a certain time prior to the suit, tendered and offered to pay to the plaintiffs the sum of money in their declaration mentioned in treasury notes, made a legal tender in payment of debts, and that from that time they have been and still are ready to pay the same, and now bring the same into court.

1. Parties went to trial at a special term of the court and the verdict and judgment were for the defendants. Objection was duly taken by the plaintiffs to one of the rulings of the court in excluding certain testimony offered by them to show the usage and mode of dealing of other banks, and the bill of exceptions to the ruling was regularly drawn out and duly signed and sealed.

Prayers for instructions to the jury were duly presented by the plaintiffs and they were refused by the court, and other and different instructions were given in their place, but no bill of exceptions in that behalf was tendered by the plaintiffs, or signed or sealed by the court.

Statement in the minutes is that the plaintiffs excepted in law as well to the refusal of the court to instruct the jury as requested, as to the instructions given, and that the exceptions and the evidence are hereby made record. Plaintiffs also made a motion for new trial, assigning two causes: (1.) Because the court refused to instruct the jury as prayed by the plaintiffs. (2.) Because the court instructed the jury as prayed by the defendants.

Order of the court was that the motion should be heard before the court at general term. Both parties were heard before the full bench, and the court affirmed the judgment as rendered at the special term. Writ of error to this court was sued out by the plaintiffs.

2. Principal questions discussed at the bar are presented, if at all, in the prayers for instructions which were refused,

and in the instructions which were given to the jury. Defendants contend that neither the prayers for instructions nor the instructions given are before the court, as they are not exhibited in any bill of exceptions signed and sealed by the justice who presided at the trial.

Settled practice in this court is that neither the rulings of the court in admitting or rejecting evidence, or in giving or refusing instructions can be brought here for revision in any other mode than by a regular bill of exceptions. Final judgments in a Circuit Court may be re-examined in this court and reversed or affirmed upon a writ of error, founded upon an agreed statement of facts, a special verdict, a demurrer to a material pleading, or a demurrer to evidence, as well as by a bill of exceptions; but none of the other modes will enable the appellate court to revise the rulings of the court in refusing to instruct the jury as requested, or the instructions as given, or the rulings of the court in admitting or rejecting evidence. Such rulings rest in parol and can only be incorporated into the record by a bill of exceptions, and of course cannot be re-examined in any other way.*

None of the other modes suggested, say the court, in the case of *Pomeroy's Lessee* v. *Bank of Indiana*,† enable the complaining party to review or re-examine the rulings of the court, except that of the bill of exceptions, and we reaffirm that rule.‡

Instructions requested or given rest in parol and do not, in the practice of this court, or in any other court where the common law prevails, become a part of the record, unless made so by a regular bill of exceptions, sealed by the judge who presided at the trial; and it is the well-settled practice in this court that an entry of the ruling in the minutes cannot be of any benefit to the party unless he seasonably re-

* Suydam *v.* Williamson, 20 Howard, 432.

† 1 Wallace, 602.

‡ Bulkeley *v.* Butler, 2 Barnewall & Cresswell, 434; Seward *v.* Jackson, 8 Cowen, 406; 2 Tidd's Practice, 896; 4 Chitty's General Practice, 7; 2 Institutes, 427; Dougherty *v* Campbell, 1 Blackford, 24; Cole *v.* Driskell, Id. 16; Strother *v.* Hutchinson, 4 Bingham, N. C. 89.

duces the same to form and causes it to be sealed by the judge.*

Views of the plaintiffs are that the bill of exceptions is not necessary in cases removed here from the Supreme Court of this District. Reference is made to the eighth section of the act to organize the courts in this District, as furnishing support to the proposition, but it is quite evident that the section referred to relates exclusively to the practice in the subordinate court, and not to the proceedings for the removal of the cause into this court for examination and revision.

Exceptions taken in the trial at the special term, before a single justice, as there provided, may be reduced to writing at the time, or may be entered in the minutes of the justice and settled afterwards in such manner as the rules of the court provide. Such exceptions must be "stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised; but the case or bill of exceptions need not be signed or sealed."†

Motion for new trial may also be entertained by the justice who tries the cause, at the same term, in the manner therein described. When such motion, however, is made upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner. Our only purpose in referring to that section is to show that no part of it has anything to do with the question before the court.

No one of the clauses mentioned make any provision whatever for a writ of error or appeal to this court. Regulations upon that subject are made by the eleventh section of the same act, which provides that any final judgment, order, or decree of the court may be re-examined, and reversed or affirmed, in the Supreme Court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, or decrees of the Circuit Court of the United

* Pomeroy's Lessee *v.* Bank of Indiana, 1 Wallace, 598.

† 12 Stat. at Large, 764.

States for this District. Writs of error and appeals were required to be prosecuted under that law, in the same manner, and under the same regulations as in the case of writs of error or appeals from judgments and decrees rendered in the Circuit Court of the United States.*

Conclusion is, that the regulations respecting the removal of cases from the Supreme Court of this District, on writs of error or appeal, are the same as from the Circuit Courts of the United States, and, of course, the questions presented in the prayers for instruction, and in the instructions given to the jury in this case, are not before the court, as neither the prayers for instruction, nor the instructions given, are any part of the record.

3. Remaining question arises under the exception to the ruling of the court, in excluding the testimony offered by the plaintiffs to show the usage and mode of dealing of other bankers in this city. The teller of the defendants, called by the plaintiffs, testified that the defendants, prior to the suspension of specie payments in April, 1861, paid all checks drawn upon the bank by their customers in gold, or its equivalent, except when the deposit had been made in depreciated paper; that after that time they uniformly made a difference with their customers in receiving and paying their deposits, between coin, or specie, and paper money, and that in all cases where the deposit had been made in coin, if requested, they paid the checks in coin; that after the suspension of the banks the defendants refused to receive currency as the equivalent of specie; that currency continued to be received and credited to customers as before, but went into the general funds of the bank, and the same money was never returned to the customer, and it was not received on special deposit; that the plaintiffs had never made any special deposits with the defendants; that the books of the bank, and the pass-books were kept as before the suspension, except that the different deposits were designated as coin, cash, checks, or treasury notes.

4. Testimony of the teller of the bank is express to the

* 2 Stat. at Large, 106; United States v. Hooe et al., 1 Cranch, 318.

point that the plaintiffs never made any special deposit with the defendants, and there is no testimony in the case to support any such theory. On the contrary, it is clear that they made their deposits for their own convenience, and were credited for the amount in the usual way on the books of the bank.

Clear inference from the whole testimony is that the deposits of the defendants were made without condition or special agreement of any kind, and in such cases the law is well settled that the depositor parts with the title to his money, and loans it to the bank.*

Deposits may be made under circumstances where the legal conclusion would be that the title to the thing deposited remained with the depositor, and in that case the bank would become the bailee of the depositor, and the latter might rightfully demand the identical money deposited as his property.

Contracts between a banker and his customers are doubtless required to be performed, and must be construed in the same way as contracts between other parties. When the banker specially agrees to pay in bullion or in coin he must do so or answer in damages for its value, and so if one agrees to pay in depreciated paper, the tender of that paper is a good tender, and in default of payment the promissee can recover only its market and not its nominal value.†

But where the deposit is general, and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender.‡

Moneys deposited with the bank in this case were entered in a pass-book in figures, expressing the amount in dollars

* Marine Bank *v.* Fulton Bank, 2 Wallace, 256.

† Robinson *v.* Noble, 8 Peters, 198; McCormick *v.* Trotter, 10 Sergeant & Rawle, 96.

‡ Bank of Kentucky *v.* Wister et al., 2 Peters, 325.

and cents, and it appears that the character of the money deposited is marked against each sum as coin, cash, check, or treasury notes, as the fact was in each particular instance. Such marks, however, are wholly insufficient to overcome the testimony of the teller, who was introduced by the plaintiffs, and who was the only witness examined upon the subject. Proof that those words were written against the several deposits for any such purpose as is supposed by the plaintiffs is entirely wanting; and in the absence of such proof it is much more reasonable to infer that they were put there as matter of convenience to the depositor, or to assist the memory as to the amount of the respective credits, in case of misrecollection or dispute.

No evidence of general usage or custom, in the ordinary sense of those terms, was offered by the plaintiffs or appears in the record. Customary rights and incidents universally attaching to the subject-matter of the contract in the place where it was made are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. But evidence of usage is not admitted to contradict or vary express stipulations restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure.*

Judge Story expressed himself strongly against local usages or customs in particular trades or kinds of business, set up to controvert or annul the general liabilities of parties under the common law as well as under the commercial law, and remarked that there was great danger in admitting evidence of such loose and inconclusive usages and customs often un-

* Bliven *v.* New England Screw Co., 23 Howard, 431; **Addison on Contracts**, 853; Greenleaf's Evidence, sec. 292.

known to parties, and always liable to great misunderstanding and misinterpretations, and allow it to outweigh the well-known and well-settled principles of law.*

Usage contrary to law, or inconsistent with the contract, is never admitted to control the general rules of law or the real intent and meaning of the parties.†

Evidence of local usage to sell commercial paper, pledged as a security for a loan, at private sale after demand of payment, and notice that such sale would be made in case of default, was held to be inadmissible in the Court of Appeals in the State of New York, all the judges concurring.‡

Evidence of the usage of banks to regard drafts drawn upon them, payable at a day certain, as checks, and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper.§

General rule of law is, that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control that general rule of law, as it is not pretended that the evidence showed a special deposit or any special contract. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law.

JUDGMENT AFFIRMED, WITH COSTS.

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* Schooner Reeside, 2 Sumner, 569.

† Dykers *v.* Allen, 7 Hill, 499; Woodruff *v.* Merchants' Bank, 25 Wendell, 674.

‡ Wheeler *v.* Newbould, 16 New York, 395.

§ Bowen *v.* Newell, 4 Selden, 194.