Statement of the case.

the offences which are pardoned are declared to be "treason against the United States, or adhering to their enemies during the late civil war." As there is no pretence that Gay, the claimant, was one of the persons thus described, or was guilty of, or charged with, the offence which was pardoned, the proclamation can have no application to him or to the present case.

DECREE OF THE CIRCUIT COURT AFFIRMED.

ROBINSON *v.* UNITED STATES.

1. Where a party agreed to deliver so many bushels of "first quality clear barley," the contract not stating whether the barley was to be delivered in sacks or in bulk, *i. e.*, loose, *held* that evidence was properly received to show a usage of trade to deliver in sacks; such evidence tending not to contradict the agreement, but only to give it precision on an important point where by its terms it had been left undefined.
2. There is no rule, in the nature of a rule of law, that a usage cannot be established by a single witness.

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

In June, 1867, Robinson & Co., merchants of San Francisco, entered into a written agreement with Major T. T. Hoyt, assistant quartermaster of the United States, "to deliver," on his order, "1,000,000 bushels of first quality clear barley." The barley, according to the terms expressed in the contract, was to be delivered between the 1st of July, 1867, and the 30th June, 1868, at such times and in such quantities as might be required, for the use of the government troops, and at certain posts named; the precise points at those posts to be designated by the acting quartermasters at the posts themselves. But there was no specification in the instrument of any particular *manner* in which the barley was to be delivered, as whether in sacks or loose, and in what is known as "bulk."

Under this contract Robinson & Co. delivered, *in sacks*, all

the barley required between July 1st, 1867, and the 1st of January, 1868; how much, exactly, did not appear, but it was more than 30,000 pounds. On the 10th of January, 1868, being required to deliver 30,000 pounds more, they tendered the quantity in bulk, that is to say, loose in wagons. The officer at the post where it was tendered refused to receive it, because it was not in sacks. Thereupon the contractor refused to furnish any more, and abandoned his contract altogether.

On suit brought by the United States, the government counsel asked a witness engaged in the grain business in California in 1867 and 1868 this question:

"Do you know the usage of the trade with respect to the delivery of barley?"

The question was objected to on the ground, among others, that it was incompetent for the plaintiff to vary the terms of the contract by a usage, but the objection was overruled. The witness then testified that it was the custom in California, *as of course*, to deliver grain in sacks, and had always been the custom; that he never knew it to be delivered in any other way, unless by special agreement, the custom of the trade being to deliver by sacks altogether; that there had been a few experiments at shipping wheat in bulk, but that these were exceptional, and that the vessels plying around the bay were not constructed for thus carrying grain; that sacks cost about 17 cents apiece, and held from 100 to 112 pounds.

There was no other witness produced to show the usage set up. The court (which, by consent of the parties, had been substituted in the place of a jury) found that, at the time of this contract, it was the usage in California, and always had been prior to that time, to deliver barley in sacks, unless it was expressly stipulated otherwise in the contract, and that, therefore, a tender in bulk did not satisfy the contract.

Judgment being accordingly given for the United States, the defendant brought the case here on exceptions to the evidence and findings.

Opinion of the court.

Mr. E. L. Goold, for the plaintiff in error:

1. A usage, to amount to a custom, must be distinguished by antiquity, certainty, uniformity, and notoriety. Smith in his Leading Cases* and all the authorities thus declare. Yet these qualities are not established by the case.

2. One witness, alone, cannot prove a *custom*, or any other fact depending upon the quality of notoriety.†

Mr. G. H. Williams, Attorney-General, and Mr. B. H. Bristow, Solicitor-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In *Barnard* v. *Kellogg*,‡ this court decided that proof of a custom or usage inconsistent with a contract and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former,§ and under it the evidence was rightly received.

It is obvious by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract on its face was satisfied by a delivery in bulk.

* Vol. i, p. 842; note to Wigglesworth *v.* Dallison.

† Lee *v.* Merrick, 8 Wisconsin, 234; Halwerson *v.* Cole, 1 Spears, 321; Wood *v.* Hickok 2 Wendell, 501; Bissell *v.* Ryan, 23 Indiana, 569.

‡ 10 Wallace, 383.

§ 1 Smith's Leading Cases, p. 386, 7th edition.

The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other, and not both must have been in the mind of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties, and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

The evidence in the present case did not tend to contradict the contract, but to define its meaning, in an important point, where, by its written terms, it was left undefined. This, it is settled, may be done.

It is objected that the usage was proved by a single witness. But we cannot assert, as a rule of law governing proof of usages of trade, that if a witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration, and universality of the usage and is uncontradicted, the usage cannot be regarded by the jury as established. On the contrary, the authorities are that in such a case it may be.*

JUDGMENT AFFIRMED.

* See 1 Smith's Leading Cases, 782, 7th edition; Vail *v.* Rice, 1 Selden, 156; Marston *v.* Bank of Mobile, 10th Alabama, 284; Partridge *v.* Forsyth, 29th Alabama, 200.