UNITED STATES *v.* KIMBAL.

1. A marginal note put by the Quartermaster's Department on bills of lading of vessels chartered by them, "that if on the arrival of the vessel at the port of destination the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," does not make a part of the contract entered into by the vessel; and if her port of destination be plainly expressed in the body of the bill, the consignee cannot, in virtue of the marginal memorandum, order her to go forward to another port.
2. The jurisdiction of the Court of Claims to pass upon claims against the United States, growing out of the destruction or appropriation of property by the army or navy engaged in the suppression of the rebellion, which jurisdiction was taken away by act of July 4th, 1864, was not restored even as to steamboats by the joint resolution of 23d December, 1869, relating to the mode of settling for them when impressed into the service of the United States during the rebellion.

APPEAL from the Court of Claims; the case being thus:

An act of March 3d, 1849,* enacts that any person who shall sustain damage by the abandonment or destruction by order of the commanding general, quartermaster, of any *horse*, &c., while such property was in the service of the United States, either by impressment or contract . . . . shall be allowed and paid the value thereof, at the time he entered the service. "The claims provided for under this act," continues the statute, "shall be adjusted by the Third Auditor, under such rules as shall be prescribed by the Secretary of War," &c.

A subsequent act† (March 3d, 1863), extends these provisions so as to include all "*steamboats* and other vessels."

Between the dates of these two acts, that is to say, in A.D. 1855,‡ Congress constituted the Court of Claims, and by the act constituting it, made it *its* duty to hear and determine

"All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."

A subsequent act, however, that of July 4th, 1864,§ some-

* 9 Stat. at Large, 415.
‡ 10 Stat. at Large, 612.
† 12 Id 743.
§ 13 Id. 381.

what limited this jurisdiction; declaring by its first section that it should

"Not extend to nor include any claim against the United States growing out of the destruction or appropriation of, or damage to, any property, by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

The second and third sections of the last-mentioned act provide that the claims of loyal citizens in loyal States for quartermaster's stores, and for subsistence furnished to the army, shall be submitted to the Quartermaster-General and the Commissary-General of Subsistence, and if found just, shall be reported to the Third Auditor of the Treasury with a recommendation for *settlement*.

After this came an act of February 21st, 1867,* which enacted that the provisions of the act of 1864 should

"Not be construed to authorize the *settlement* of any claim for supplies taken or furnished for the use of the armies of the United States, nor for the occupation of or injury to real estate, nor for the appropriation or destruction of or damage to personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the Southern rebellion, *in a State or part of a State declared in insurrection.*"

Finally, came a joint resolution of Congress, passed the 23d of December, 1869,† resolving that the act of 1867 shall not be so construed as

"To debar the *settlement* of claims for *steamboats* or other vessels, taken without the consent of the owner or impressed into the military service of the United States during the late war, in States or parts of States declared in insurrection, provided the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and such steamboats or other vessels were in the insurrectionary districts by proper authority."

As to the matter of loyalty, it was agreed in writing by

* 14 Stat. at Large, 397.

† 16 Id. 368.

the counsel on both sides, that the defendant "had at all times borne true allegiance to the government of the United States, and had not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, and that proof of such fact was duly made upon trial in the Court of Claims, and might be regarded as of record in the findings now for hearing before the Supreme Court of the United States."

In the state of the statutes above set forth, and of the Court of Claims' jurisdiction under them, the military authorities of the United States chartered the bark Annie Kimbal, on the 18th of April, 1865, to carry a cargo of 1061 tons of coal from Philadelphia to Port Royal, S. C. By the terms of the bill of lading the coal was to be delivered to the quartermaster or his assignee. Freight was payable at the rate of $6.25 per ton, and demurrage $100 per day, allowing 21 days for discharging. In the margin of the bill were these *two* memoranda:

"*If on the arrival of this vessel at the port of destination, the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading.*

"Freight and demurrage payable only on certificate of quartermaster that the cargo has been received in good order."

The marginal note, above italicized, on the bill of lading, was a printed direction placed by the Quartermaster's Department, intended for the convenience of the department, and as a direction to the officers thereof. There was no express evidence as to the intention of the parties concerning it; but such marginal note was placed on bills of lading by the United States officers in the Quartermaster's Department, and did not form a part of the body of the instrument as did certain other formal clauses and conditions.

The bark arrived at Port Royal with her freight on the 4th May, 1865, and immediately tendered it to the consignee, the quartermaster of the United States. The quartermaster, on the 6th of May, refused to receive the same, and ordered the master of the bark to proceed with it to

Statement of the case.

Key West, and report to the quartermaster at that port, which additional service the master of the bark refused to perform, and notified to the quartermaster that the owners would hold the United States liable for all damages if such service was enforced. On the 8th May the master was compelled to undertake the additional voyage, and received notice from the quartermaster that in case of refusal he would be taken from the vessel and another master be substituted and sent in command of the vessel. The master then protested at being compelled to sail at the time specified by the quartermaster for the reason that it was not safe, as the tide had ebbed about two hours, and there would not be water enough on the bar to take the vessel safely over. The delay requested was refused, and the vessel was taken in tow by a government tug. She struck violently on the bar off Port Royal by reason of the low water, it being near the ebb, and sprang aleak. Being severely injured, she was towed back and beached to prevent her from foundering.

After the injury to the vessel, she was detained by the defendants' delay in discharging her freight at Port Royal until the 24th of June, 1865, the detention being owing to no fault of the master or crew. The vessel was then further detained at Port Royal by her injuries received as aforesaid, from and including the 25th June until the 11th July. She was then towed by the agents of the United States to Boston, which port she reached on the 18th July, 1865, when her crew were discharged. The damages suffered by the claimants for the loss of their vessel's service and her expenses was the sum of $100 per day, making the sum of $5300; that is to say:

30 days (from 24th May, when the 21 lay days expired, to 24th June, when she was formally discharged), 30 days at $100, ...	$3000
23 days (from June 25th to when the discharge was completed till July 18th, when the vessel reached Boston), 23 days at $100, ...	2300
	$5300

The claimants paid $7604.41 for the repairs of the bark at

Boston, and this amount was expended strictly in making good the vessel's injuries.

The United States paid to the claimants the amount due for the freight, but they refused to pay the demurrage up to the 24th June, caused by their delay in discharging the cargo, and the further demurrage caused by their impressment of the vessel up to the 18th July, 1865, when she arrived at Boston, and they also refused to pay the $7604.41 paid by the claimants in the necessary repairs of the vessel.

The certificate of the quartermaster showed that the cargo had been received in good order.

Upon these facts the court decided as conclusions of law:

1st. That the bill of lading on which the action was brought constituted a valid contract of affreightment for the transportation of goods and merchandise from Philadelphia to Port Royal, and that the marginal note thereon, expressing no consideration for further services, imposed no obligation upon the owners to transport the goods to any other port, except with their consent, and upon a rate to be agreed upon.

2d. That for the demurrage caused by the defendants in not discharging their freight within twenty-one days after the vessel's arriving at Port Royal, that is to say, by the 25th May, the claimants should recover demurrage until the freight was discharged on the 24th June, at the rate agreed upon in the bill of lading, to wit, $100 per day, or $3000.

3d. That the enforced service of the vessel, while remaining in the possession of her master and crew, was not an "appropriation" of the claimants' property by the army of the United States within the meaning of the act July 4th, 1864, but that it was an impressment of their vessel and crew's service within the meaning of the acts 3d March, 1849, and 3d March, 1863, and of the joint resolution 23d December, 1869, and that the claimants were entitled to recover the value of their vessel's services and expenses from the 25th June to the 18th July, 1865 ($2300), and their costs and expenditures ($7604.41) in repairing and making whole her injuries.

The Court of Claims thus decreed:

Demurrage of both kinds, ...	$5,300 00
Repairs, ...	7,604 41
Whole amount of decree, ...	$12,904 41

From this decree the United States appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, appellant:

1. The court erred in deciding that the marginal memorandum was no part of the contract. The bill of lading and the memorandum must be construed together. The marginal clause was not merely a direction to the government officers at Port Royal, but, like the memorandum or marginal clause in a policy of insurance, was a part of the contract entered into between the parties, and by it the master was required to proceed to Key West, when directed so to do by the quartermaster at Port Royal.*

If this be so, then it is evident that the delay in getting away from Port Royal for Key West was owing to the fault of the master. But, however this might be, the stranding of the bark when going over the bar was a peril of the sea, and the consequent injury is one which must be borne by the owners of the vessel and not by the government.†

But if the contract of affreightment did not require the master to proceed, when ordered from Port Royal to Key West, and there discharge his cargo, it follows either that the action of the government officers in requiring this duty of him was tortious, in which case no action can be maintained against the government in the Court of Claims for the consequence thereof, or else it was an appropriation of the vessel for the military service of the government, within the meaning of the act of July 4th, 1864, and, therefore, is a case expressly taken out of the jurisdiction of the Court of Claims thereby. In neither case can the consequences of ordering the vessel to sea be considered as damages arising from a breach of contract by the government.

* Barnard *v.* Cushing, 4 Metcalf, 230.

† Reed *v.* United States, 11 Wallace, 591.

Recapitulation of the case in the opinion.

Messrs. Chipman, Peck, and Durant, contra:

1. The marginal memorandum was not a part of the contract. It was a mere direction to the Federal officers by their superiors and was meant for cases where the right existed. The whole of the contract was in the body of the instrument.

2. It has been considered by persons competent to form an opinion that this joint resolution, of December 23d, 1869, restored the jurisdiction of the Court of Claims in a case like the present, which comes fully within the terms of the proviso; and in support of this view we submit that as the acts of February 19th, 1867, and July 4th, 1864, are referred to in general terms by the joint resolution of December 23d, 1869, the latter embraces the whole of the former. Now the first section of the act of July 4th, 1864, prohibited the Court of Claims from settling by judgment the whole of a certain class of claims, while the joint resolution declares said act shall not debar the settlement of certain individual claims of that class; and this claim is one of those individuals; therefore the Court of Claims is not debarred from settling it.

If all this is so, the decree was plainly right, as the loyalty of the claimant is fully admitted, and indeed was open to no question whatever.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 18th of April, 1865, the United States contracted with the bark Annie Kimbal to convey a cargo of anthracite steamer coal from Philadelphia to Port Royal, in South Carolina. The United States agreed to pay freightage "at the rate of $6.25 per ton, and demurrage $100 per day, allowing 21 days for discharging." In the margin of the bill of lading was the following memorandum: "Freight and demurrage payable only on the certificate of quartermaster that the cargo has been received in good order."

The vessel arrived at Port Royal on the 4th of May, 1865. The master immediately tendered the delivery of the cargo to the quartermaster, who was the consignee. He refused to receive it, and ordered the master to proceed with the

vessel and cargo to Key West. This the master refused to do, and notified the quartermaster that the owners would hold the United States responsible for damages if the order was enforced. The master protested against being compelled to sail immediately, upon the ground that the state of the tide would render his departure then unsafe. Permission to delay was refused. The vessel was towed by a government tug. She struck violently on a bar off Port Royal, was severely injured, and sprung aleak. She was towed back and beached to prevent her from foundering. She was detained at Port Royal, by the delay of the authorities of the United States in discharging her cargo, until the 24th of June. The quartermaster certified that the cargo was received in good order, and that the detention of the vessel was owing to no fault of the master or crew. The vessel was unavoidably further detained at Port Royal until the 11th of July. She then left, a government tug towing her, for Boston, where she arrived on the 18th of that month. Her crew were thereupon discharged.

The twenty-one days specified in the contract for the delivery of the cargo expired on the 24th of May. The Court of Claims found that the damages which the appellees had sustained by the loss of the vessel's service, and her expenses, was $100 per day, making an aggregate of $5300, and that they had expended at Boston, in repairing the injuries to the vessel, the sum of $7604.41.

Before the commencement of this suit the United States paid the amount due, according to the terms of the contract, for freight, but refused to pay anything more.

The Court of Claims held that the appellees were entitled to recover the sums above mentioned, making an aggregate of $12,904.41, and gave judgment accordingly.

So far as the thirty days' demurrage, extending from the 24th of May to the 25th of June, is concerned, the judgment is clearly correct. The certificate of the quartermaster brings the case within the terms of the contract. The appellees were as much entitled to this compensation as to the amount

stipulated to be paid for freight. The right to both rests upon the same foundation, and the appellants might as well have refused to pay the latter as the former. This item amounted to the sum of $3000.

The allowance of the residue of the damages, and of the amount expended for repairs, involves other considerations, and requires a separate examination.

The order to the master to proceed to Key West was certainly not authorized by the contract. That imposed no such obligation. No rate of freight for this voyage had been agreed upon, and no such stipulation had been entered into. The contract expired upon the delivery of the cargo at Port Royal. It is silent as to anything further. It may be safely assumed that nothing beyond this was in the contemplation of either party when the vessel left Philadelphia. The Court of Claims held that the conduct of the quartermaster was not an appropriation, but the impressment of the vessel. The duress, the *vis major*, the resistance of the master, and his compulsory obedience, are clearly developed in the findings of the record. We think the view of the court below upon this subject was the proper one; but did that entitle the appellee to recover for the damages and repairs here under consideration?

The first section of the act of July 4th, 1864, declares that the jurisdiction of the Court of Claims shall not extend to "any claim against the United States growing out of the destruction or appropriation of, or damage to, any property, by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof." The second and third sections provide for the adjustment and payment, through the Quartermaster-General, the Commissary-General, and the Third Auditor of the Treasury, of all claims of loyal citizens in States not in rebellion, for quartermaster stores and subsistence furnished to the army.*

The act of February 21st, 1867,† declares that the act of

* 13 Stat. at Large, 381.

† 14 Id. 397.

1864 shall not be construed to authorize the settlement of any claim for supplies taken or furnished for the use of the armies of the United States, nor for the occupation of or injury to, real estate, nor for the appropriation or destruction of, or damage to, personal property, by the military authorities or troops of the United States, "where such claim originated during the war for the suppression of the Southern rebellion, *in a State or part of a State declared in insurrection.*"

The resolution of the 23d of December, 1869,* provides that the act of 1867 shall not be so construed as "to debar the settlement of claims for steamboats or other vessels, taken without the consent of the owner or impressed into the military service of the United States during the late war, in States or parts of States declared in insurrection, provided the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and such steamboats or other vessels were in the insurrectionary districts by proper authority."

The act of 1864 took away the jurisdiction of the Court of Claims as to all the cases there specified. The act of 1867 forbade the payment of the claims which it described, while the resolution permitted the settlement of those within the category which it laid down and the qualifications prescribed in the proviso. The resolution refers expressly to the act of 1867, and that act to the act of 1864. They are in *pari materiâ*, constitute a common context, and must be construed together. This case, in the aspect of it we are considering, is clearly within the body of the resolution. Whether it is also within the requirements of the proviso is not disclosed by the findings in the record. They are silent upon that subject. If the appellees can bring themselves within both they will be entitled to be paid, but not, we think, by the instrumentality of the Court of Claims.

The purpose of the resolution, obviously, was not to enlarge or restore the jurisdiction of that court, but to remove the bar which the act of 1867 had been held to create. That

* 16 Stat. at Large, 368.

bar affected not the court, but the officer of the army and of the treasury, whose duty it would otherwise have been to adjust and liquidate such demands. When the restriction was removed the jurisdiction and authority of those officers, and not of the court, was revived. The phrase "*settlement*," used in the resolution, has reference to executive and not to judicial action. The context of the two acts and the resolution point clearly to this construction of the latter. The remedy of the appellees, if they are entitled to any, must be sought at the hands of the executive or legislative department of the government. The judicial department is incompetent to give it.

In our opinion, the Court of Claims erred in taking jurisdiction of either of the claims outside of the contract. The *United States* v. *Russell** is clearly distinguished by its controlling facts from the present case. It is not intended to impugn anything said by the court in that case.

JUDGMENT REVERSED, and the cause remanded with directions to enter a judgment

IN CONFORMITY TO THIS OPINION.

WHITE *v.* HART.

1 The Constitution adopted by Georgia, A.D. 1868, by which it was provided that "no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof," is to be regarded by the court as voluntarily adopted by the State named, and not as adopted under any dictation and coercion of Congress. Congress having received and recognized the said Constitution as the voluntary and valid offering of the State of Georgia, this court is concluded by such action of the political department of the government.

2 At no time during the rebellion were the rebellious States out of the pale of the Union. Their constitutional duties and obligations remained unaffected by the rebellion. They could not then pass a law impairing the obligation of a contract more than before the rebellion, or now, since.

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* *Supra*, p. 623.