Kendall Vs. Stokes

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Appeal No. : 44 U.S. 87

Appellant : Kendall

Respondent : Stokes

Judgement :

Kendall v. Stokes - 44 U.S. 87 (1845)
U.S. Supreme Court Kendall v. Stokes, 44 U.S. 3 How. 87 87 (1845)

Kendall v. Stokes

44 U.S. (3 How.) 87

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF COLUMBIA

[The reader is referred to a former case between these parties, reported in 37 U. S. 12 Pet. 524. The decision of the court in the present case is so intimately connected with the facts in both, that it is impossible to give a clear account of the principles established, without a reference to those facts.]

SYLLABUS

After the decision in the former case, *Stokes &c.;,* brought a suit against Kendall, which, rested ultimately on two counts, *viz.,* the first and fifth. The first claimed damages for the suspension, by Kendall, on the books of the Post Office Department, of certain credits which had been entered by his predecessor. The fifth, for the refusal, by Kendall, to credit Stokes, &c.;, with the amount awarded in their favor by the Solicitor of the Treasury.

The damages claimed in the first count constituted a part of the reference to the solicitor, as shown by the plaintiffs below in their own evidence.

After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded.

The acts complained of were not ministerial, but were official acts, done by Kendall in his character of Postmaster General. A public officer, acting from a sense of duty, in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment.

With regard to the fifth count, the application for the mandamus covered the same ground as that taken in this count. Both rested on the refusal of Kendall to pay a sum of money to which Stokes &c.;, were lawfully entitled.

But where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

This is especially true where the party has resorted to a mandamus, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action

would be inconsistent with the decision of the court which awarded the mandamus.

Evidence of special damage was improperly admitted, under the circumstances of the case in the court below.

The Supreme Court of the United States having affirmed (37 U. S. 12 Pet. 524) the decision of the circuit court, awarding a mandamus against Amos Kendall, application was made by Stokes &c.;, to Kendall that the sum of money mentioned in the proceedings should be carried to their credit on the books of the department. Kendall declined to interfere in the matter, upon the ground that the "auditor" had charge of the books, and that he himself had no power to settle claims, and no money to pay them with. On 30 March, 1838, a peremptory mandamus was issued by the circuit court, commanding him to obey and execute the act of Congress immediately on the receipt of the writ, and certify perfect obedience to it on 3 April next.

On 3 April, Mr. Kendall addressed a letter to the court saying that he had communicated the award of the Solicitor of the Treasury to the auditor, and received from him official information that the balanced of said award had been entered to the credit of the claimants, on the books.

In October, 1839, Stokes &c.;, brought a suit against Kendall. The declaration consisted of five counts, three of which were abandoned after a verdict and motion in arrest of judgment. The two remaining were the first and fifth.

The first count averred, in substance, that the plaintiffs, with Richard C. Stockton, deceased, under and in the name of said Richard, were contractors for the transportation of the mails of the United States, by virtue of certain contracts entered into between them and the late William T. Barry, then Postmaster General of the United States. That the said William T. Barry, as Postmaster General, did cause certain credits to be given, allowed, and entered in the books, accounts, and proper papers in the Post Office Department, in favor of the plaintiffs and said Richard, as such mail contractors, under and in the name of said Richard. That the

defendant, on succeeding Mr. Barry in the office of Postmaster General, wrongfully, illegally, maliciously, and oppressively caused said items of account, so entered, and credited, and allowed, and upon which payments had been made, to be suspended on the books, accounts, and papers of the Post Office Department, and did cause said plaintiffs and said Richard, under and in the name of said Richard, to be charged on said books, papers, and accounts, with said several items and sums of money, amounting to $122,000.

The 5th count averred the passage of a private act of Congress

entitled "An act for the relief of Wm. B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore" by which the Solicitor of the Treasury was authorized and required to determine on the equity of the claims of them, or any of them, growing out of certain alleged contracts between them and Mr. Barry, and by which the Postmaster General was directed to credit them with such amounts as might be awarded, pursuant to the act. This count also averred the actual rendition of an award by Virgil Maxcy, then Solicitor of the Treasury, for the sum of $162,727.05, in favor of Richard C. Stockton, as the representative of himself and the plaintiffs below, and the refusal of Mr. Kendall to comply fully with the terms of the award, by crediting them with the full amount awarded.

The cause came on for trial at November term, 1841, which resulted in a verdict for the plaintiffs.

After the rendition of the verdict aforesaid, the defendant produced the following certificate by the said jurors, and prayed the court to be permitted to have the same entered on the minutes of the court, to which the court assented.

"We, the jurors, empanelled in the case of William B. Stokes v. Amos Kendall, and in which case we have this day rendered our verdict for the plaintiffs for $11,000, do hereby certify that said verdict was not founded on any idea that the defendant performed the acts complained of by the plaintiffs, and for which we gave damages as above stated, with any intent other than a desire faithfully to perform

the duties of his office of Postmaster General, and protect the public interests committed to his charge, but the said damages were given by us on the ground that the acts complained of were illegal, and that the said sum of $11,000 was the amount of actual damage to plaintiffs estimated by us to have resulted from said illegal acts."

Upon the trial the defendant took three bills of exceptions.

The 1st exception was to the competency of the evidence to sustain the action. The evidence offered by the plaintiffs was:

1. A transcript of the record in the mandamus case.

2. The report of Virgil Maxcy, Solicitor of the Treasury.

3. Sundry letters and documents.

4. Oral testimony relating to the partnership.

The defendant offered four prayers to the court, praying instructions to the jury that the defendant was not responsible to the plaintiffs in the right in which they then sued under the 1st count; that he was not liable under the 5th count for refusing to comply with so much of the award of the solicitor as he, on the ground of want of jurisdiction in the said solicitor, refused to comply with; that he was not liable for consequential damages; and that the plaintiffs had no joint right of action.

All of which prayers were refused by the court, to which refusal the defendant excepted.

2d Bill of Exceptions.

The defendant then offered in evidence sundry depositions and papers.

1. The depositions of Andrew Jackson, Martin Van Buren, and B. T. Butler.

2. Correspondence between Mr. Kendall and the Attorney General.

3. The Attorney General's opinion, Document No. 123, 26th Congress, 2d session, House of Ex.Doc. page 1010.

4. Letter from the Solicitor of the Treasury.

5. Reports of post office committees of Senate and House.

6. The evidence of Francis S. Key, Esq.

Upon all which evidence the defendant founded four prayers:

1. That plaintiffs were not contractors.

2. That defendant was not liable if he acted from a conviction that it was his official duty to set aside the extra allowances.

3. That he was not liable if he acted from a conviction that the solicitor had no lawful jurisdiction to audit and adjust the items &c.;

4. That he was not liable for any of his acts, if the jury believe that he acted with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs.

All of which prayers the court refused to grant, and to the refusal the defendant excepted.

3d Bill of Exceptions.

The plaintiffs offered evidence to prove their special expenses and losses, such as counsel fees, tavern bills, discounts &c.;, to the admission of which evidence the defendant objected; but the court overruled the objection and allowed it to be given. To which overruling the defendant excepted.

The case came up upon all these grounds.

MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

The record in this case is very voluminous, and contains a great mass of testimony, and also many incidental questions of law not involving the merits of the case, which were raised and decided in the circuit court, and to which exceptions were taken by the plaintiffs in error. But both parties have expressed their desire that the controversy should now be terminated by the judgment of this Court, and that the leading principles which must ultimately decide the rights of the parties should now be settled, and that the case should

Page 44 U. S. 94

not be disposed of upon any technical or other objections which would leave it open to further litigation. In this view of the subject it is unnecessary to give a detailed statement of the proceedings in the court below. Such a statement would render this opinion needlessly tedious and complicated. We shall be better understood by a brief summary of the pleadings and evidence, together with the particular points upon which our decision turns, leaving unnoticed those parts of the record which can have no influence on the judgment we are about to give, nor vary in any degree the ultimate rights of the parties.

At the time of the trial and verdict in the circuit court, the declaration contained five counts. But after the verdict was rendered, the plaintiffs in that court, with the leave of the court, entered a *nolle prosequi* upon the second, third, and fourth, and the judgment was entered on the first and the fifth. It is only of these two last mentioned counts, therefore, that it is necessary to speak. The verdict was a general one for the plaintiffs, and their damages assessed at $11,000.

The first count states that by virtue of certain contracts made with William T. Barry, while he was Postmaster General, and services performed under them, the plaintiffs on 1 May, 1835, were entitled to receive and have allowed to them the sum of $122,000, and that that sum was accordingly credited to them on the books of the Post Office Department, and that Amos Kendall, the defendant in the court below, afterwards became Postmaster General, and as such illegally and

maliciously caused the items composing the said amount to be suspended on the books of the department, and the plaintiffs to be charged therewith, whereby they were greatly injured, and put to great expenses, and suffered in their business and credit.

The fifth count recites the Act of Congress of July 2, 1836, by which the Solicitor of the Treasury was authorized to settle and adjust the claims of the plaintiffs for services rendered by them under contracts with William T. Barry, while he was Postmaster General, and which had been suspended by Amos Kendall, then Postmaster General, and to make them such allowances therefore as upon a full examination of all the evidence might seem right and according to principles of equity, and the Postmaster General directed to credit them with whatever sum or sums of money the solicitor should decide to be due to them, for or on account of such service or contract; and after this recital of the act of Congress, the plaintiffs proceed to aver that services had been performed by them under contracts with William T. Barry while he was Postmaster General, on which their pay had been suspended by Amos Kendall, then Postmaster General, and that for these claims the Solicitor of the Treasury allowed the plaintiffs large sums of money amounting to $162,727.05; that the defendant had notice of the premises, and that it became his

Page 44 U. S. 95

duty as Postmaster General to credit the plaintiffs with this sum, but that he illegally and maliciously refused to give the credit, by reason whereof the plaintiffs were subjected to great loss, their credit impaired, and they were obliged to incur heavy expenses in prosecuting their rights, to their damage in the sum of $100,000.

The defendant plead not guilty, upon which issue was joined.

At the trial, the plaintiffs offered in evidence the record of the proceedings in the mandamus which issued from the circuit court upon their relation on 7 June, 1837, commanding the said Amos Kendall to enter the credit for the sum awarded by the

solicitor. It is needless to state at large the proceedings in that suit, as they are sufficiently set forth in the report of the case in 37 U. S. 12 Pet. 524; the judgment of the circuit court awarding a peremptory mandamus having been brought by writ of error before the supreme court, and there affirmed at January term, 1838. Various papers and letters were also offered in evidence by the plaintiffs to show that the allowances mentioned in the declaration had been suspended by the defendant, and that after the award of the solicitor, and before the original mandamus issued, he had refused to credit $39,472.47, part of the sum awarded, upon the ground that the items composing it were not a part of the subject matter referred, and upon which, as the defendant insisted, the solicitor had no right to award. Other papers and letters were also offered showing that after the judgment of the circuit court awarding a peremptory mandamus had been affirmed in the supreme court, the plaintiffs demanded a credit for the above-mentioned balance on 23 March, 1838; that the defendant declined entering the credit, alleging that a recent change in the post office law had placed the books and accounts of the department in the custody of the auditor, and some difficulty having arisen on this point, the circuit court, on 30 March, 1838, issued a mandamus commanding the Postmaster General to enter the credit on the books of the department, and to this writ the defendant made return on 3 April, 1838, that the said credit had been entered by the auditor who had the legal custody of the books.

The whole of this evidence was objected to by the defendant, but the objection was overruled and the testimony given to the jury. And upon the evidence so offered by the plaintiffs, before any evidence was produced on his part, the defendant moved for the following instruction from the court:

"The defendant, upon each and every of the plaintiffs' said counts, severally and successively prayed the opinion of the court, and their instruction to the jury that the evidence so as aforesaid produced and given on the part of the plaintiffs, so far as the same is competent to sustain such count, is not competent and sufficient to be left to the jury as evidence of any act or acts done or omitted or refused to be done by the defendant, which legally laid him liable

to the plaintiffs in this action, under such count, for the consequential damages claimed by the plaintiffs in such count."

This instruction was refused and the defendant excepted.

The question presented to the court by this motion in substance was this: had the plaintiffs upon the evidence adduced by them shown themselves entitled in point of law to maintain their action for the causes stated in their declaration upon the breaches therein assigned, assuming that the jury believed the testimony to be true?

The instruction asked for was in the nature of a demurrer to the evidence, and in modern practice has, in some of the states, taken the place of it. In the Maryland courts, from which the circuit court borrowed its practice, a prayer of this description at the time of the cession of the district and for a long time before, was a familiar proceeding, and a demurrer to evidence seldom, if ever, resorted to. And the refusal of the court was equivalent to an instruction that the plaintiffs had shown such a cause of action as would authorize the jury, if they believed the evidence, to find a verdict in favor of the plaintiffs, and to assess damages against the defendant for the causes of action stated in the declaration.

Now the cause of action stated in the first count is the suspension, by the defendant, of the allowances made by his predecessor in office; and of the recharge of sums with which the plaintiffs had been credited by Mr. Barry when he was the Postmaster General. And it appeared in evidence, by the proceedings in the mandamus, that the plaintiffs being unable to settle with the defendant the dispute between them on the subject, they applied to Congress for relief; that upon this application a law was passed referring the matter to the Solicitor of the Treasury, with directions that he should inquire into, and determine the equity of these claims, and make them such allowances therefor as might seem right according to the principles of equity, and that the Postmaster General should credit them with whatever sums of money, if any, the solicitor should decide to be due; that the plaintiffs assented to this reference, and offered evidence before the solicitor that they were entitled to the allowances and credits claimed by them; and

that, from the conduct of the Postmaster General, in suspending and recharging these allowances and credits, they had been compelled to pay a large amount in discounts and interest, in order to carry on their business, and that the solicitor had finally determined in favor of their claims, and awarded to them the sum hereinbefore mentioned, giving them, as appears in his report to Congress, interest on the money withheld from them, and also, that, before this suit was brought, they had obtained a credit on the books of the department for the whole sum awarded by the solicitor.

Assuming, for the sake of the argument, that an action might in the first instance have been sustained against the Postmaster General, can the plaintiffs still support a suit upon the original cause of

Page 44 U. S. 97

action? It was not a controversy between the plaintiffs and Amos Kendall as a private individual, but between them and a public officer acting for and on behalf of the United States. If they had sustained damage, it was the consequence of his act, and the question of damages was necessarily referred with the subject matter in controversy, out of which that question arose. It was an incident to the principal matters referred, and therefore within the scope of the reference; and it is not material to inquire whether damages for the detention of the money were claimed or not, or allowed or not. In point of fact, however, the plaintiffs did claim interest on the money withheld as a damage sustained from the conduct of the Postmaster General, and offered proof before the solicitor of the amount of discounts and interest they had been compelled to pay, and, moreover, were allowed, in the award, a large sum on that account, which was paid to them as well as the principal sum. The question, then, on the first count is can a party, after a reference, an award, and the receipt of the money awarded, maintain a suit on the original cause of action upon the ground that he had not proved, before the referee, all the damages he had sustained? or that his damage exceeded the amount which the arbitrator awarded? We think not. The rule on that subject is well settled. It has been decided in many cases, and is clearly stated in *Dunn v. Murray,* 9 Barn. & C. 780. The plaintiffs, upon their own showing, therefore, were

not entitled to maintain their action of the first count, and the circuit court ought so to have directed the jury.

The judgment upon this Court is also liable to another objection equally fatal. The acts complained of were not what the law terms ministerial, but were official acts done by the defendant in his character of Postmaster General. The declaration, it is true, charges that they were maliciously done, but that was not the ground upon which the circuit court sustained the action either on this count or the fifth. For, among other instructions moved for on behalf of the defendant, the court were requested to direct the jury:

"That if they found from the evidence that the Postmaster General acted from the conviction that he had lawful power and authority as Postmaster General to set aside the extra allowances made by his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so, and if the plaintiffs suffered no injury from such official act, but the inconveniences necessarily resulting therefrom, that the defendant was not liable."

This instruction was refused; the court thereby in effect giving the jury to understand that however correct and praiseworthy the motives of the officer might be, he was still liable to the action, and chargeable with damages.

We are not aware of any case in England or in this country in which it has been held that a public officer, acting to the best of his

judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. The Postmaster General had undoubtedly the right to examine into this account, in order to ascertain whether there were any errors in it which he was authorized to correct, and whether the allowances had in fact been made by Mr. Barry, and he had a right to suspend these items until he made his examination and formed his judgment. It repeatedly and unavoidably happens, in transactions with the government, that money due to an individual is withheld from him for a time, and payment suspended in order to

afford an opportunity for a more thorough examination. Sometimes erroneous constructions of the law may lead to the final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake. A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland v. Ld. Palmerston,* 7 J.B.Moore 91, 3 Brod. & B. 275.

The case in 9 Cl. & F. 251, recently decided in England, in the House of Lords, has been much relied on in the argument for the defendant in error. But upon an examination of that case it will be found that it had been decided by the court of Sessions in Scotland, in a former suit between the same parties, that the act complained of was a mere ministerial act which the party was bound to perform, and that this judgment had been affirmed in the House of Lords. And the action against the party for refusing to do the act was maintained not upon the ground only that it was ministerial, but because it had been decided to be such by the highest judicial tribunal known to the laws of Great Britain. The refusal for which the suit was brought took place after this decision, and the learned Lords, by whom the case was decided, held that the act of refusal, under such circumstances, was to be regarded as willful, and with knowledge; that the refusal to obey the lawful decree of a court of justice was a wrong for which the party, who had sustained injury by it, might maintain an action, and recover damages against the wrongdoer. This case, therefore, is in no respect in conflict with the principles above stated, nor with the rule laid down in the case of *Gidley v. Ld. Palmerston.*

In the case before us the settlement of the accounts of the plaintiffs properly belonged to the Post Office Department, of which the defendant was the head. As the law then stood it was his duty to exercise his judgment upon them. He committed an error in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally decided. But as

the

case admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him.

We proceed to the fifth count. But before we examine the cause of action there stated, it will be proper to advert to the principles settled by this Court in the case of the mandamus hereinbefore referred to. The court in that case, speaking of the nature and character of the proceeding by mandamus, which had been fully argued at the bar, said that it was an action or suit brought in a court of justice, asserting a right, and prosecuted according to the forms of judicial proceeding, and that a party was entitled to it when there was no other adequate remedy; and that although in the case then before them the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of Congress, yet as that remedy might not be adequate to afford redress, they were, as a matter of right, entitled to pursue the remedy by mandamus.

Now the former case was between these same parties, and the wrong then complained of by the plaintiffs, as well as in the case before us on the fifth count, was the refusal of the defendant to enter a credit on the books of the Post Office Department for the amount awarded by the solicitor. In other words, it was for the refusal to pay them a sum of money to which they were lawfully entitled. The credit on the books was nothing more than the form in which the act of Congress, referring the dispute to the solicitor, directed the payment to be made. For the object and effect of that entry was to discharge the plaintiffs from so much money, if on other accounts they were debtors to that amount, and if no other debt was due from them to the United States, the credit entitled them to receive at once from the government the amount credited. The action of mandamus was brought to recover it, and the plaintiffs show by their evidence that they did recover it in that suit. The gist of the action in that case was the breach of duty in not entering

the credit, and it was assigned by the plaintiffs as their cause of action. The cause of action in the present case is the same, and the breach here assigned, as well as in the former case, is the refusal of the defendant to enter this credit. The evidence to prove the plaintiffs' cause of action is also identical in both actions. Indeed, the record of the proceedings in the mandamus is the testimony relied on to show the refusal of the Postmaster General, and the circumstances under which he refused, and the reasons he assigned for it. But where a party has a choice of remedies for a wrong done to him, and he elects one, and proceeds to judgment, and obtains the fruits of his judgment, can he, in any case, afterwards proceed in another suit for the same cause of action? It is true that in the suit by mandamus the plaintiffs could recover nothing beyond the amount awarded. But they knew that, when they elected the remedy. If the goods of a

Page 44 U. S. 100

party are forcibly taken away under circumstances of violence and aggravation, he may bring trespass, and in that form of action recover not only the value of the property, but also what are called vindictive damages -- that is, such damages as the jury may think proper to give to punish the wrongdoer. But if, instead of an action of trespass he elects to bring trover, where he can recover only the value of the property, it never has been supposed that, after having prosecuted the suit to judgment and received the damages awarded him, he can then bring trespass upon the ground that he could not in the action of trover give evidence of the circumstance of aggravation, which entitled him to demand vindictive damages.

The same principle is involved here. The plaintiffs show that they have sued for and recovered in the mandamus suit the full amount of the award; and having recovered the debt they now bring another suit upon the same cause of action, because in the former one they could not recover damages for the detention of the money. The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention. This principle will be found to be fully recognized in 2 Bl. 830, 831; 5 Co. 61, *Sparry's Cas.,* Com.Dig. tit. action, K., 3. And in the case of *Moses v. Macfarlan,* 2 Burr.

1010, Ld. Mansfield held that the plaintiff having a right to bring an action of assumpsit for money had and received to his use or a special action on the case on an agreement, and having made his election by bringing assumpsit, a recovery in that action would bar one on the agreement, although in the latter he could not only recover the money claimed in the action of assumpsit, but also the costs and expenses he had been put to. The case before us falls directly within the rule stated by Ld. Mansfield.

This objection applies with still more force, when, as in this instance, the party has proceeded by mandamus. The remedy in that form, originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed, and issuing only in cases relating to the public and the government, and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress. Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause after he has obtained the benefit of the mandamus, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the mandamus, and inconsistent also with the decision of the court which awarded it. If he had

Page 44 U. S. 101

another remedy, which was incomplete and inadequate, he abandoned it by applying for and obtaining the mandamus. It is treated both by him and the court as no remedy. Such was obviously the meaning of the Supreme Court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the mandamus, because the other form of action was inadequate to redress the injury, and they would not therefore require the plaintiffs to pursue it. And they speak of the action on the case as an alternative remedy, not as accumulative and in addition to the mandamus. In the case in 9

Clark & F. 251, hereinbefore mentioned upon another point, the Attorney General in his argument said that no other action would lie in any case where the party was entitled to a mandamus. And Ld. Campbell, in giving his judgment, said that this proposition was not universally true, and at any rate applied only to the original grant of the mandamus, and not to the remedy for disobeying it, and that no case had been cited to show that an action would not lie for disobedience to the judgment of the court. This remark upon the proposition stated by the Attorney General shows clearly that in his judgment you could not resort to a mandamus and to an action on the case also for the same thing. If the Postmaster General had refused to obey the mandamus, then indeed an action on the case might have been maintained against him. But the present suit is not brought on that ground. No question is presented here as to the necessity of pleading a former recovery in bar, nor as to the right to offer it in evidence upon the general issue. The point in the circuit court did not arise upon the pleading of the defendant, nor upon evidence offered by him, but upon the case made by the plaintiffs, in which, by the same evidence that proved their original cause of action, they also proved that they had already sued the defendant upon it and recovered a judgment, which had been satisfied before this suit was brought. And we think upon such evidence the instruction first above mentioned ought to have been given on this (the fifth) count, as it appeared by the plaintiffs' own showing that they had already recovered satisfaction for the injury complained of in their declaration.

The case before us is altogether unlike the cases referred to in the argument, where, after a party has been admitted or restored to an office, he has maintained an action of assumpsit or case to recover the emoluments which had been received by another or of which he had been deprived during the time of his exclusion. In those cases, the cause of action in the mandamus was the exclusion from office; and the suit afterwards brought was to recover the emoluments and profits to which his admission or restoration to office showed him to have been legally entitled. The action of assumpsit or case would not have restored him to the office, nor have secured his right to the profits. But in the case before the Court, if this action had been resorted to in the first instance, instead of the mandamus, the plaintiffs

could have recovered the amount due on the award, and the damages arising from its unlawful detention must have been assessed and recovered in the same verdict. Clearly they could not have maintained one action on the case for the amount due, and then brought another to recover the damages, and this, not because both were actions on the case, but because they could not be permitted to harass the defendant with two suits for the same thing, no matter by what name the actions may be technically called, nor whether both are actions on the case, or one of them called a mandamus.

But if this action could have been maintained, we think that most of the evidence admitted by the circuit court to enhance the damages ought not to have been received. It consisted chiefly of discounts and interest paid by the plaintiffs before the award of the solicitor, and of expenses on journeys and tavern bills, and fees paid to counsel for prosecuting their claim before Congress and the courts. It appears by the record that before this evidence was offered the court had instructed the jury, that malice on the part of the defendant was not necessary to support the action, and it appears also that the jury, which found the verdict and assessed the damages, declared that their verdict was not founded on any idea that the defendant did the acts complained of, and for which they gave the damages of $11,000, with any intent other than a desire faithfully to perform the duties of his office of Postmaster General, and to protect the public interests committed to his charge, and that the damages were given on the ground that his acts were illegal, and that the sum given was the amount of the actual damage estimated to have resulted from his illegal acts.

We have already said that although this action is in form for a tort, yet in substance and in truth it is an action for the non-payment of money. And upon the principles upon which it was supported by the court, and decided by the jury, if there had been no proceeding by mandamus to bar the action, the legal measure of damages upon the fifth count would undoubtedly have been the amount due on the award, with interest upon it.

The testimony, however, appears to have been offered chiefly under the first count, because the items for interest paid, and traveling and tavern expenses, for the most part, bear dates before the award, and also a portion of the fees of counsel. The evidence was certainly inadmissible under this count, since, for the reasons already given, no action could be maintained upon it if there had been no previous proceeding by mandamus, and consequently no damages could be recovered upon it. But independently of this consideration, and even if the action could have been sustained, there are insuperable objections to the admission of this testimony. In the first place, no special damages are laid in the declaration, and in that form of pleading no damages are recoverable, but such as the law implies to have accrued from the wrong complained of; 1 Chit.Pl. 385, and

Page 44 U. S. 103

certainly the law does not imply damages of the description above stated. But we think the evidence was not admissible in any form of pleading. In the case of *Hathaway v. Barrow,* 1 Campb. 151, in an action on the case for a conspiracy to prevent the plaintiff from obtaining his certificate under a commission of bankruptcy, the court refused to receive evidence of extra costs incurred by the plaintiff in a petition before the chancellor. In the case of *Jenkins v. Biddulph,* 4 Bingh. 160, in an action against a sheriff for a false return, the court said they were clearly of opinion that the plaintiff was not entitled to recover the extra costs he had paid; that, as between the attorneys and their clients, the case might be different, because the attorney might have special instructions, which may warrant him in incurring the extra cost, but that in a case like the one before them, the plaintiff could only claim such costs as the prothonotary had taxed. And in the case of *Grace v. Morgan,* 2 Bingh. 534, in an action for a vexatious and excessive distress, the plaintiff was not allowed to recover as damages the extra costs in an action of replevin which the plaintiff had brought for the goods distrained, and the case in 1 Stark. 306, in which a contrary principle had been adopted, was overruled.

These were stronger cases for extra costs than the one before us. The admission of the testimony in relation to the largest item in these charges -- that is, for

interest paid by the plaintiffs amounting to more than $9,000 -- is still more objectionable. For it appears from the statement in the exception that the very same account had been laid before the solicitor and had induced him, as he states in his report to Congress, to make the plaintiffs an allowance in his award for interest, amounting to $6,893.93. And to admit this evidence again in this suit was to enable the plaintiff to recover twice for the same thing, and after having received from the United States what was deemed by the referee a just compensation for this item of damage, to recover it over again from the defendant.

There are several other questions stated in the record, but it is needless to remark upon them, as the opinions already expressed dispose of the whole case. The judgment of the circuit court must be

Reversed.

MR. JUSTICE Mc LEAN.

This case is a writ of error. The facts and merits of the case are before us only so far as they are connected with the legal points raised by the bills of exceptions. I will consider these points, and not indulge in a course of remarks which could only be proper on a motion for a new trial.

Before taking up the exceptions, I will observe that from the finding of the jury, the defendant below was acquitted of all malice with which he stands charged in the declaration. And I will add that there is nothing in the record inconsistent with the inference, that he acted from a sense of duty, and with a desire to advance the public service.

The second, third, and fourth counts in the declaration were discontinued, so that the judgment was entered on the first and fifth counts. The first count states, that the plaintiffs were contractors for the transportation of the mail of the United States under William T. Barry, then Postmaster General, and that for services so rendered the said Postmaster General caused credits to be entered in their accounts on the books of the department for the sum of one hundred and twenty-two thousand dollars. The defendant below was appointed to succeed William T.

Barry, in the office of Postmaster General, and that he wrongfully &c.;, caused the above sum of money, which had been paid to the plaintiffs as aforesaid, to be suspended on the books of the department and to be charged as a debit against them, by reason whereof the plaintiffs were unable to obtain from the department moneys under their several contracts for the transportation of the mail, which subjected them to great losses in raising funds to enable them to carry on their contracts; that their credit was destroyed, and that they were obliged to incur great expense in obtaining payment of the above sum &c.;

The fifth count claims damages for the refusal of the Postmaster General to credit them with the amount of the award of the solicitor of the Treasury, as by the act of Congress he was required to do, by reason whereof they were kept out of the money for a long space of time, and were subjected to expensive litigations &c.;

Page 44 U. S. 790

The first exception by the defendant below that I shall consider is as follows:

"That the acts of defendant, as Postmaster General, in suspending the allowances mentioned in the two letters from P. S. Loughborough, as treasurer, both dated 14 May, 1835, the one addressed to Messrs. Stockton & Stokes, the other to L. W. Stockton, and above given in evidence by plaintiffs, and in continually holding the same under suspension and refusing to credit or pay the same till the rendition of the solicitor's award, above given in evidence by plaintiffs, were not such as laid him liable to the plaintiffs in the right in which they now sue, to the aforesaid action, and that upon the evidence so as aforesaid produced and given on the part of the plaintiffs, they are not entitled to maintain this action on their said first, second, and third counts, of their amended declaration."

As the second and third counts of the declaration were discontinued, no reference can be had to them in considering the legal questions in the case.

The court properly refused to give the last clause of the above instruction, on the ground that it requested them to determine the effect of the evidence. This has

been so often decided by this Court, that no reference to authority is deemed necessary. The other part of the exception goes to the capacity in which the plaintiffs sue as partners.

The contracts under which they sue were made in the name of Richard C. Stockton, but they were made for the benefit of the plaintiffs equally, as jointly interested with Stockton. When the contracts were about being executed, the Postmaster General was informed that all the plaintiffs were interested in them, and inquiry was made of him whether the contracts made in the name of "Richard C. Stockton" would inure to the benefit of all concerned. The reply was that they would, and with that understanding the contracts were signed.

The duties under the contracts were apportioned among the parties. From this state of facts, the question arises whether the plaintiffs having a joint interest in the contracts may not sue as partners. They made the contracts in the name of Richard C. Stockton, and can there be any doubt of their right thus to make them? In this view, the others are not subcontractors under Stockton, but are jointly interested with him in the contracts. And if anything has been done to render the head of the department liable to Richard C. Stockton, his associates being jointly interested with him are proper parties in the action for damages. The action is not on the written contracts, but by those interested in them for a wrong done. No subdivisions of the labor among the partners can affect this question. I can have no doubt as to the right of the plaintiffs to sustain this action, if there be a ground for any action. The circuit court therefore, in my judgment, did not err in refusing the above instruction.

Page 44 U. S. 791

The evidence of O. B. Brown, a clerk in the department, to show the interest of the plaintiff's, is objected to, on the ground that parol evidence cannot be heard, to contradict a written agreement. How this applies in the present case, it is difficult to perceive. Brown does not contradict the written contracts, but swears that the plaintiffs made them with the department in the name of Richard C. Stockton. And

this evidence was admissible, on the ground that where any association of individuals bind themselves by a particular name or designation, in a written contract, in an action by or against the persons thus bound, the facts may be shown by parol.

The practice which prevails in this district, of praying the court for instructions on the close of the plaintiff's evidence, is a most inconvenient one, and can answer no other purpose than to introduce confusion in the case, and perplex the jury. In this case, there were two prayers for instructions on the evidence of the plaintiffs, as regards the capacity in which they sue, and a similar instruction is again asked after the close of the defendant's evidence. These instructions are founded upon the evidence, and are substantially the same, though expressed in different words.

The third instruction asked by the defendant in the court below will be considered in connection with the second one prayed, after all the evidence had been heard.

The fourth instruction refused by the circuit court, was, "that the" evidence so as aforesaid produced and given, on the part of the plaintiffs, so far as the same is competent to sustain any count in the declaration, is not competent and sufficient to be left to the jury, as evidence of any act or acts clone or omitted, or refused to be done by defendant, which legally laid him liable to the plaintiffs in this action, under such count, for the consequential damages claimed by plaintiff in such count.

This instruction goes only to the admissibility of the evidence. The question would have been more properly raised by a motion to overrule the evidence. But viewing it as an instruction, it prays the court to instruct the jury that the facts proved are not competent and sufficient -- not to prove the right of the plaintiffs to recover, but to be left to the jury, "I as evidence of any act or acts done or omitted, or refused to be done by defendant," &c.;

No particular facts proved are alleged to be incompetent evidence, and the court, consequently, could not give the instruction, provided there was any legal evidence before the jury, which conduced to sustain the plaintiffs' right under

anyone of the counts in their declaration.

That the above instruction should be mistaken by anyone as a demurrer to evidence is, to me, very extraordinary.

A demurrer to evidence withdraws it from the jury, but this instruction calls upon the court to say whether "the evidence was competent to be considered by the jury." The instruction is not in

Page 44 U. S. 792

form or effect like a demurrer to evidence. It was nothing more nor less than an objection to the admissibility of the evidence.

The fifth instruction prayed is as to the capacity in which the plaintiffs sue and which I have already considered.

I now come to the instructions prayed by the defendant below after the close of his evidence.

The first one, being substantially of the character of the fifth, above stated, will not be examined.

The second instruction was,

"If the jury find from the said evidence that the defendant, as Postmaster General, acted in the premises from a conviction that he had the lawful power and authority as such Postmaster General, to set aside the extra allowances, as claimed under the allowance of his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so, and if plaintiffs suffered no oppression, injury, or damage from such official act of the defendant, but the inconveniences necessarily resulting from such official act, then he is not liable to plaintiff's in this action for having so set aside, suspended, and recharged such extra allowances."

The principle embodied in this instruction is this: if an executive officer do an act in good faith, and, as he believes, within his power, he is not responsible for an injury done to an individual.

It will require but little reflection to show, that the proposition, to the extent here stated, is unsustainable. The principle is made to depend, not upon the character of the act or its consequences, but on the intent with which it was done. Now there are many duties of an executive officer which are purely ministerial, and others which are discharged under prescribed limitations. It is inconsistent with the nature of our institutions, that an irresponsible power should be exercised by any public agent. Every officer, from the highest to the lowest, in our government, is amenable to the laws for an injury done to individuals. An act which the law sanctions cannot be considered as injurious to anyone. And where a discretion may be exercised, if it be exercised in good faith, the officer is not responsible for an error of judgment. But this, of necessity, is limited to matters which come within his jurisdiction. He can claim no immunity beyond this. If he could, he might act without any other restraint than his own discretion, and this would be to exercise an unmitigated and irresponsible despotism.

If a member of this Court should imprison a citizen, for causes over which the law gave him no jurisdiction, he would be responsible for damages in an action at law. And it is supposed that no higher immunity can be claimed by an executive officer. It is a fundamental principle in our government that no individual, whether in office or out of office, is above the law. In this our safety consists.

Of all the powers exercised by the departments of this government,

those of the executive are the most extensive and the most summary. They have not the forms and the deliberations of a judicial procedure. Hence it is of the utmost importance that the executive power should be defined and guarded by law. From the nature of these duties, an enlarged discretion is indispensable, and with the exercise of this discretion no other power can interpose, and no legal

responsibility results from its rightful exercise. But this is not an unlimited discretion. If its boundaries be not specifically defined by statutory enactments, yet they are found in the thing done, and in the well established principles of private right. The courts are often called on to exercise their discretion, but it must be a legal discretion. The same rule applies, where individual rights are involved, to every executive officer.

A Postmaster General, by the terms of every mail contract, on the happening of certain failures by the contractor, may forfeit it. But if he shall arbitrarily annul the contract when by the terms of it he had no power to do so, he is unquestionably responsible to the party injured. And in such a case, the plea that he acted in good faith and with a desire to discharge his duty, would not avail him. He is presumed to be acquainted with his duties, and the powers he may exercise. A contrary presumption would suppose him to be unqualified to discharge the duties of his office. It therefore follows, when a public officer does an act to the injury of an individual, which did not come within the exercise of his discretion, and was clearly not within the powers with which he is invested by law, he may be held legally responsible.

In the first count of the declaration, the plaintiffs charge that the defendant not only refused to pay to them the sum of $122,000, which under their contracts they had earned, and which had been credited to them in their accounts, but that he caused that sum to be recharged to them, which represented them, on the books of the department, as defaulters &c.;

Now had he power to do this? As this point has been expressly adjudged by this Court, I need refer to no other authority.

In the case of *United States v. Bank of Metropolis,* 15 Pet. 400, the Court said,

"The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances which the Postmaster General was not legally authorized to allow, then it was the duty of the present Postmaster General to disallow such items of credit,"

and to this instruction this Court answered:

"The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors of calculation, and in cases of rejected claims in which

Page 44 U. S. 794

material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

The point here ruled is in every respect the point under consideration. And the decision is clear and unequivocal against the power of the Postmaster General to supervise the allowances and contracts of his predecessor. And more especially must this be the case, where the allowances have not only been made for services rendered, but credited to the party on the books of the department.

On the ground of fraud or mistake, a Postmaster General may suspend or annul the acts of his predecessor. But in such a case the ground should be set up as matter of justification. No such defense has been made in the present case.

Here is an act done by the defendant, as Postmaster General, which this Court say he had no power to do. And as a consequence of that act great injury has been done to the plaintiffs, as alleged in the declaration, shown by the evidence and sanctioned by the verdict of the jury. And here the question arises whether the act so complained of subjects the defendant to an action at law. My brethren think it does not; I have come to a different conclusion.

In stating the grounds of my opinion, I acquit the postmaster

general of all improper intention. And I not only do this, but I am willing to admit, that the circumstances under which he acted were such as to require from him great vigilance and firmness. He acted too under the sanction of the President and in accordance with the opinion of the Attorney General. These precautionary measures go to explain his action, and show that whatever damages might have been incurred by the plaintiffs and recovered by them, the defendant should be indemnified by the government. He should no more be subjected to loss in this respect than a collector of the customs who, under the instructions of the Treasury Department, collects an illegal duty upon goods imported, which subjects him to a judgment for damages.

But if the right of action exist, these circumstances cannot destroy it. They create a clear case of indemnity by the government, but they do not lessen nor excuse the injurious consequences to the plaintiffs.

There are three grounds on which a public officer may be held responsible to an injured party.

1. Where he refuses to do a ministerial act, over which he can exercise no discretion.

Page 44 U. S. 795

2. Where he does an act which is clearly not within his jurisdiction.

3. Where he acts willfully, maliciously, and unjustly, in a case within his jurisdiction.

The first position is sustained by this Court in the case of *Kendall v. United States,* 12 Pet. 613. Speaking of the act required by the law to be done by the Postmaster General, the Court said "it is a precise definite act, purely ministerial, and about which the Postmaster General had no discretion whatever." And again, in 37 U. S. 612 , they say

"the plaintiff's right to the full amount of the credit, according to the report of the solicitor, having been ascertained and fixed by law, the enforcement of that right falls properly within judicial cognizance."

In page 37 U. S. 614 , it said, "it is seldom that a private action at law will afford an adequate remedy" where the damages are large. The act required to be done was that the Postmaster General should cause a credit to be entered on the books of the department in favor of the plaintiffs below, for a certain sum. "His refusal to do this subjected him to an action." This decision then sustains the position, that a public officer is liable to an action for damages sustained, for refusing or neglecting to do a mere ministerial act, over which he could exercise no discretion.

In the case of *Ferguson v. Earl of Kinnoull,* 9 Clark & Finnelly 279, a decision in the House of Lords, in 1842, the lord chancellor said

"When a person has an important public duty to perform, he is bound to perform that duty, and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury he has so sustained."

And he cites *Sutton v. Johnston,* I Term 493. His lordship further remarks:

"A party had applied to a justice of the peace to take his examination under the Statute of Elizabeth, the statute of hue and cry; the justice had refused to do this, and the party had in consequence sustained injury because he was deprived of his right of bringing a suit against the hundred in consequence of that neglect. It was held, upon the principle I have stated, that he was entitled to recover damages against the justice for the neglect of his public duty, he having in consequence sustained a personal injury."

Green v. Bucklechurches, 1 Leon. 323, c. 456. He states another case, of *Stirling v. Turner.*

"Stirling was a candidate for the office of bridgemaster; the mayor refused to take a poll, in consequence of which he brought an action against him, and it was held

that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll; that he neglected that duty; that the party in consequence sustained injury, and it was therefore held that the action might be maintained."

In his opinion Lord Brougham says, page 289,

"Courts of justice,

Page 44 U. S. 796

that is, the superior courts, courts of general jurisdiction, are not answerable, either as bodies, or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has clothed them with judicial functions, are not answerable for errors of judgment, and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing; it is implied in the nature of judicial authority. But where the law neither confers judicial power nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey, and with the exception of the legislature and its branches, every body is liable for the consequences of disobedience."

Lord Cottenham said,

"I feel much satisfaction at finding that this case has been so deeply considered and so fully discussed by the noble and learned lords who have preceded me. I concur in the opinions which they have stated."

Lord Campbell said,

"Where there is a ministerial act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion entrusted to them. There seems no reason

why the refusal to do a ministerial act by a person who has certain judicial functions, should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction, he has ceased to be a judge."

And the House of Lords, without a dissenting voice, affirmed, on the above principles, the judgment.

2. An officer is liable where he does an act injurious to another, which is clearly not within his jurisdiction.

In the case of *Tracy v. Swartwout,* 10 Pet. 95, this Court say,

"It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law by giving bond for the lawful rate of duties, but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost or its value greatly reduced in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not

Page 44 U. S. 797

liable to exemplary damages, but he can claim no further exemption where his acts are clearly against law."

In the language of Lord Campbell above cited, "where a judge does an act which is clearly beyond his jurisdiction, he ceases to be a judge." And if he cease to be a judge, all the immunities connected with his official character, as relates to the act, also cease.

The Treasurer of the United States, in the exercise of his discretion, withholds the salary of a judicial or other officer on the ground that such officer has not faithfully discharged his duties. Now this is a matter about which the treasurer can exercise no discretion. He is therefore liable to an action. And on this principle, any and every officer may be made responsible for injuries done to another.

3. That an officer is liable where he acts willfully, maliciously, and unjustly in a case within his jurisdiction, would seem to result from the foregoing considerations. But as there is no pretense that this action is to be maintained on this ground, I shall not consider it farther than to say that the law is clear where the facts are established.

The third instruction prayed by the defendant, and refused by the court, is as follows:

"If the jury, in addition to the facts above supposed in the last preceding form of instruction, further find from said evidence that the defendant, in refusing to credit plaintiff's with such parts of the solicitor's awards as he refused to credit them with as aforesaid, acted from a conviction that the solicitor had no lawful jurisdiction or authority to audit, settle, or adjust the claims or items of claims upon which he awarded the several sums of money, constituting the sum of what defendant refused to credit them with as aforesaid, and from a conviction that it was therefore his official duty to refuse to credit them with so much of the amount awarded by the solicitor as aforesaid; and if plaintiffs suffered no oppression, injury or damage, from such refusal of the defendant, but the inconvenience necessarily resulting thereupon, then he is not liable to plaintiffs in this action for such refusal."

This instruction, as the one preceding it, rests the liability of the defendant upon the intention with which the act was done, and consequently, however injurious it might have been to the plaintiffs, if done with a *bona fide* intent, they are without remedy. This principle has been examined under the preceding instruction, and nothing further need here be said than that this Court, in the mandamus case above cited, held that the act referred to in this instruction was ministerial; that the defendant had no discretion over it, but was bound to enter the credit under the act

of Congress. And for not doing so, they held he was liable to an action.

The fourth instruction refused was,

"That the defendant is not liable in this action for any of his said acts in the premises if, in addition to the facts supposed in the two last preceding forms of

Page 44 U. S. 798

instruction, the jury believes from the whole evidence that he acted in the premises with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs."

The record shows no evidence of malice against the defendant below. His liability on other grounds has been already discussed.

The third and last bill of exceptions was

"The plaintiffs, further to support the issues on their part, above joined, produced and offered evidence to prove their special expenses, losses &c.;, in consequence of the defendant's acts in the premises, to-wit, such expenses and losses as are set out in the papers annexed, marked A, B, C, D (copied in pages 633-638), and also their expenses and losses in the form of bank discounts, paid by Stockton and Stokes, on post office acceptances, and interest paid by them on money borrowed from May 30, 1835, to Nov. 9, 1836, amounting to $9,749.14, a particular account whereof (being the same as the document 52, annexed to the solicitor's report above given in evidence by plaintiffs) they produced, as taken from the books of Stockton and Stokes, and proved that all the original entries in the said account were in the handwriting of one A. Matter, at that time the clerk who kept the said books, and has since deceased, and further evidence to prove that Stockton and Stokes were in good credit up to May, 1835, when said suspensions were made by order of the defendant, and that their credit was afterwards destroyed in consequence of such suspensions."

To the admission of which evidence defendant objected, but the court overruled the objection. This objection goes to the entire evidence in the case. And although

a part of that evidence thus objected to should have been overruled if specially objected to, yet as the exception extended to other evidence clearly admissible, it was properly overruled. This point has been so often decided and is in itself so evident that I shall not cite any authority. The objection, to prevail, must always be limited to that part of the evidence offered, which is incompetent.

Does the mandamus suit bar this action? My brethren think it does; in my opinion, it does not.

There is no plea in bar, and how the proceedings by mandamus can constitute a bar without being pleaded I am at a loss to determine. It is true those proceedings were given in evidence by the plaintiffs to show what expense they had incurred in prosecuting that suit for the balance of the award which should have been credited promptly by the Postmaster General. But how can this constitute a bar to this action?

What was the object of the mandamus -- not to recover money, but to obtain an order from the court directing the Postmaster General to enter a credit to the plaintiffs for the balance of the award, on the books of the department. And such an order was made by the

Page 44 U. S. 799

court, in pursuance of which the credit was given. The Act of 2 July, 1836, referred the claims of the plaintiff's, against the Post Office Department, to the solicitor of the Treasury, who was authorized to make them

"such allowances, therefore, as upon a full examination of all the evidence may seem right according to the principles of equity, and that the Postmaster General be and he is hereby directed to credit the plaintiffs with whatever sum or sums of money, if any, the said solicitor shall so decide to be due"

to them &c.;

The solicitor reported in favor of the plaintiffs $161,563.89 as the amount of principal and interest due to them by the department. Of this sum, $122,101.46

were credited to the plaintiffs on the books of the department. But the Postmaster General refused to credit the balance, and for this cause the mandamus was brought.

Could the mandamus have been pleaded in bar of the present action? The objects of the two suits are entirely distinct. By the mandamus, a credit for the full amount of the sum awarded to the plaintiffs was sought. By the present action, the plaintiffs seek to recover damages sustained by them, in their business as contractors for the transportation of the mail, by reason of the suspension of more than $120,000 which they had earned and which had been allowed and credited to them by the predecessor of the defendant, but which the defendant had recharged against them. And also for the refusal to credit $39,000 of the award, as the law required.

Notwithstanding this suspension and refusal, the plaintiffs allege that they were required rigidly to perform their contracts with the department, which they did at a great expense and sacrifice, and that in the prosecution of their rights, they were subjected to great expense in employing counsel, loss of time &c.; This is the foundation of the present action. And it is only necessary to state it to show that the mandamus, if pleaded, could have been no bar. The two actions are distinct in their character and objects and also in the evidence on which they rest. Interest was allowed to the plaintiffs for the sums of money withheld from them by the department, but no allowance was made by the solicitor to the plaintiffs for the consequential damages sustained by them in the premises. The evidence acted upon by the solicitor, as stated in document 52, was before the jury, but the plaintiffs could claim no item which had been

allowed by the solicitor. The sums allowed by the solicitor had been credited to the plaintiffs. Those sums, therefore, constituted no part of the present case. Still the document was proper evidence to prove the award of the solicitor, as a part of the proceedings in the mandamus case. Indeed the record in that case was properly received as evidence to show the delays and expenses to which the plaintiffs were subjected by the acts of the defendant.

It is said that in an action against the Postmaster General, the sum awarded might. have been recovered, and also the damages claimed

Page 44 U. S. 800

in this action, if such damages constitute a legal right of action. And from this an argument is drawn in support of the position, that the mandamus suit bars the present action. The force of this argument is not perceived. For if the damages as above stated could have been recovered by an action against the Postmaster General, it does not follow that the same damages were recoverable by the mandamus. In fact no damages were recovered by the mandamus suit. It is true that that proceeding would bar an action on the award, as it procured a credit to be entered for the amount of the award. But the solicitor was not, by the act of Congress, authorized to inquire and he did not inquire into any consequential damages suffered by the plaintiffs beyond the interest on the sums suspended. And the present action is brought for the consequential injuries sustained by the plaintiffs, under the peculiar circumstances of the case.

From this view it must be apparent that the mandamus suit, if technically pleaded, could be no bar to this action. The history of judicial proceedings, it is confidently believed, affords no similar bar to this, which has been sustained. Nor does the award constitute a bar, for the reason that the arbitrator did not allow, nor was he authorized by the law to allow, a single item which is claimed in the present action. All the items allowed by the arbitrator were before the jury, as they could not be separated from the proceedings in the mandamus case, but all those items were shown to have been credited to the plaintiffs, and therefore the plaintiffs could not insist that those items should be any ground of recovery in this action. To say, therefore, that the evidence in this action on which the verdict was rendered is the same as that in the mandamus suit is in my judgment wholly unsustained by the facts in the case. I think the judgment of the circuit court should be affirmed.