It makes no difference that the note is not payable to order or bearer: *Smith* v. *Kendal*, 6 T.R. 123; nor that it is payable by instalments; *Oridge* v. *Sherborne*, 11 M. & W. 374; nor that the whole becomes due on default: *Carlow* v. *Kinealy*, 12 M. & W. 139. Even if this be not so, and the whole amount became payable by default on the 22nd of May, the defendants are then entitled to days of grace upon the whole. He cited also *Rawlinson* v. *Stone*, 3 Wills. 4; *Bentley* v. *Northouse*, M. & M. 66; *Milne* v. *Graham*, 1 B. & C. 192; *Hill* v. *Lewis*, 1 Salk. 132; *Brown* v. *Harradan*, 4 T. R. 148, Byles on Bills, 191n.

Keane, Q. C., (*Philbrick* with him), in reply.—This is not a promissory note within the statute. A promissory note must be for the payment of a sum certain; and this is not so. but a promise to pay one of two different sums according to circumstances: *Carlos* v. *Fancourt*, 5 T. R. 482.

Cur. adv. vult.

Nov. 18.—Pollock, C.B., now delivered the judgment of the court.*—This case was tried before the Recorder of London, when a verdict was found for the defendants. The question arose on a promissory note, not made payable to bearer or to order, but simply to Miller; which note was to be paid by instalments, with the condition that if any instalment was not paid upon the day when it was due, the whole should immediately become payable. The court granted a rule to shew cause in ignorance that there is a case of *Carlow* v. *Kinealy*, (*ubi supra*), which, in their opinion, decides the express point. That decided that a promissory note payable by instalments, subject to a condition that on default being made in payment of the first instalment, the whole amount should become immediately payable, is within the statute of Ann, and negotiable. A prior case (*Oridge* v. *Sherborne*, *ubi supra*) had decided that a promissory note, made payable by instalments, is within the statute, and that the maker is entitled to days of grace, where the note is negotiable. Upon the authority of these cases the majority of the court are of opinion that this rule should be discharged. As I dissent from view, I think it my duty to express my dissent for the purpose of giving the parties a right to appeal. The statute of Ann, in my opinion, applies to negotiable instruments only, and I think there is a great difference between holding that a negotiable instrument falls within the provisions of that statute, and holding that the same rule applies to an instrument not negotiable. Moreover, I observe that the court, in *Carlow* v. *Kinealy*, considered that the point before them had been decided by *Oridge* v. *Sherborne;* but I am of opinion that that was not so. If it had been I think those cases would have been binding, but in my opinion we are not justified in deciding on the authority of those cases. I am very much inclined to believe that the opinion of Lord Kenyon (*Smith* v. *Kendal*, *ubi supra*) is the correct one, and that this is a mere contract, and that the statute applies only to negotiable instruments. Then we have been referred to the custom of merchants, but the custom of merchants has nothing to do with a mere contract; if it had, every case would have to be decided according to it. But I doubt whether there is any custom of merchants relating to a bill drawn in such a way that in default in payment of one instalment the whole becomes due. The statute of Ann was passed to apply the custom of merchants to promissory notes; but in such a case there is no custom to apply. For these reasons I dissent from the opinion of the court. That dissent will not operate, but I do my duty in expressing that dissent, and having done so I pronounce the judgment of the court that this rule be discharged.

Rule discharged.

* Pollock, C.B., Bramwell, Channel, and Pigott, BB.

UNITED STATES REPORTS.

DISTRICT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF NEW YORK.

In Admiralty.

Councer v. The Steam-tug "A. L. Griffin," &c.

A libel for the loss of a vessel on the Canadian shore of Niagara river, having been referred to a master, he reported that at the time of the loss the vessel was *worth* a certain sum of "dollars in gold, or Canadian currency," and that gold or Canadian currency was at such time, at a premium of forty-nine per cent. over United States legal tender notes. *Held*, that the value being reported at a certain sum in foreign currency, the damages were to be estimated at the value of that sum in United States notes and the use of the word "gold" in connection with Canadian currency did not require any different rule than would have been applied had the value been stated in the foreign currency alone.

This action was brought to recover the damages sustained by the libellant in the loss of the scow "Andrew Murray," on the Niagara river at the mouth of Chippawa Creek, in Canada West, on the 14th day of December, 1863.

After the hearing, upon pleadings and proofs, an interlocutory decree was made, referring it to a commissioner "to take the necessary proofs, and report the amount of damage which the libellant had sustained by reason of the loss of his scow," &c. In pursuance of such decree of reference, the Commissioner reported "that on the 14th day of December, 1863—on which day the said scow 'Andrew Murray' was lost—she, the said scow 'Andrew Murray,' was worth, including equipments, at Chippawa, the sum of nine hundred and fifty dollars in gold, or Canadian currency, and that the interest on nine hundred and fifty dollars from the 14th day of December, 1863, to and including the date of this report, is the sum of forty-three dollars and forty-three cents," and also, "that on the 14th day of December, 1863, gold, or Canadian currency, was at a premium in the city of Buffalo of forty-nine per cent. over United States legal tender notes." The Commissioner's report was dated on the 24th of July last.

Upon the coming in of this report, it was insisted by the counsel for the libellant that, in estimating the damages of the libellant, the forty-nine per cent. reported by the Commissioner as the difference between Canadian currency and United States legal tender notes should be added to the value of the property