

justice if a decree could be made at once against the undertakers, as is done against stipulators in admiralty proceedings. But we find no precedent for such a course upon a bond or undertaking given by way of indemnity in proceedings at common law or in chancery, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance, which is matter of record.

Our conclusion, therefore, is, that the decree of the Supreme Court of the district must be reversed, and the cause remanded with instructions to enter a personal decree in favor of the complainant against the defendant Gilbert, for the amount of \$4,020, with interest and costs; and that execution issue thereon; and further, to decree that the lien claimed by the complainant was a valid lien at the commencement of this suit; but that, by reason of the undertaking filed in the cause, the buildings and lots mentioned in the pleadings became released and discharged from the lien; and that the complainant have leave to proceed at once upon said undertaking in an action of law to be brought for that purpose; also, that the complainant have a decree for the costs against the defendants Gilbert, Boughton & Moore, and the Connecticut General Life Insurance Company of Hartford; and it is

So ordered.

UNITED STATES *v.* KIMBALL.

1. A collector of internal revenue, when sued on his bond for the balance of taxes charged to him under sect. 3218, Rev. Stat., is entitled to a credit for all uncollected taxes he transferred to his successor, if he proves that he used due diligence to collect them.
2. The certificate of the Commissioner of Internal Revenue, that the collector used such due diligence, is a condition precedent to the allowance of a credit on the books of the treasury by the First Comptroller, before the suit was brought, but not to a defence upon the trial.
3. The rejection by the Commissioner of a claim for such credit presented by the collector entitles the latter, when sued for such taxes, to prove his claim.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action brought by the United States upon the bond of a collector of internal revenue. The breach assigned was his failure to pay over the balance alleged to be due July 1, 1871, for stamps and other property transmitted to him by the proper officers of the government, and for public moneys which he had collected.

The plaintiff put in evidence a certified account from the books of the Treasury Department showing the balance due. It appears that, on going out of office, the collector turned over to his successor a list of uncollected taxes to that amount. Evidence was introduced tending to show that he had used due diligence to collect them, and applied to the Commissioner of Internal Revenue for a credit to the amount of them. His claim to a credit was rejected by that officer.

The court charged the jury, in substance, that the collector, having made an unsuccessful application to the proper department for the credit, had a right to make claim therefor on the trial, if under the law and the facts he was entitled to it.

The court refused to instruct the jury that the receipt of the collector's successor in office showing such lists was not entitled to weight as evidence, unless accompanied by the certificate of the Commissioner of Internal Revenue or the First Comptroller of the Treasury, that due diligence had been used by the collector; and as no such certificate was offered in the case, the receipt should be disregarded by the jury.

The United States excepted to the charge given and to that refused. Judgment was rendered for the defendant, and the United States sued out this writ.

Mr. Assistant Attorney-General Smith for the United States. There was no opposing counsel.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In a suit against a collector of internal revenue on his bond for a balance of taxes charged to him under the provisions of sect. 3218, Rev. Stat., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection.

The certificate of the Commissioner of Internal Revenue is a condition precedent to a credit by the First Comptroller of the Treasury before suit, but not to a defence upon the facts if a suit is brought.

The presentation to the Commissioner of Internal Revenue by a collector of a claim for credit in his account, and its rejection by him, is such a presentation of the claim "to the accounting officers of the treasury for their examination," and disallowance by them, as will permit the collector, under sect. 951, Rev. Stat., to make proof of his claim in a suit brought against him by the United States to collect what is due from him on his account.

Judgment affirmed.

MEYER *v.* HORNBY.

1. The ruling in *Brooks v. Railway Company* (*supra*, p. 443), that work done by a contractor upon a part of a railroad then in process of construction entitles his lien, under the laws of Iowa, to precedence over that of a prior mortgage upon the entire road, reaffirmed.
2. The contractor was a stockholder in a construction company, which, when it placed on the market the bonds secured by the mortgage, gave a guaranty that the local subscriptions and grants would be sufficient to prepare the road for the reception of the rails, and also undertook to make good any deficiency. *Held*, that he was not thereby estopped from setting up his lien, as against the mortgagee.
3. If the holders of the bonds sustained any loss by reason of the guaranty, the company which gave it is liable in damages.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The facts are sufficiently stated in the opinion of the court.

Mr. James Grant and *Mr. Joseph H. Choate* for the appellants.

Mr. James T. Lane for the appellee.

MR. JUSTICE MILLER delivered the opinion of the court.

Appellants, as trustees in a railroad mortgage, brought suit to foreclose it, and made Hornby a defendant. He set up a claim