been recognised by this court, in a case between the same parties, at the present term, as above referred to.

As this court sanctions all the instructions of the circuit court given to the jury, in this case, at the prayer of the defendant, and also in refusing to instruct on the prayer of the plaintiffs, the judgment of the circuit court is, as a matter of course, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*399] *United States, Plaintiffs in error, *v.* Walter Jones, Administrator *de bonis non* of Benjamin G. Orr.

The Same *v.* The Same.

Public contracts.—Sureties.

A contract was made for the delivery of rations for the use of the troops of the United States, "thirty days' notice being given of the post or place where the rations may be wanted; in an action on a bond, with sureties, for a balance claimed to be due to the United States by the contractor, the United States introduced the testimony of a Mr. Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed) were then informed of the fixed posts within the limits of the contract, and the number of troops there stationed; and that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; and that the contractor was informed he was to continue so to do, without any other notice; and that special requisitions and notices of thirty days would be made and given, for all other supplies at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors; but he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything more or less than what the contract specified; and he did not know that there had been any submission or agreement of contractors, to such a construction of their contracts, but that such was the rule adopted by the accounting officers, in settling the accounts of contractors. The defendant, among other things, introduced evidence to show, that the contractor always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies at all posts where provisions were required, and without regard to their being old established posts, or new ones established after the contract. After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the contractor, in supplying the fixed posts as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, is liable, under the bond and contract upon which this action is founded." The circuit court refused to give this instruction, and the question was, whether it ought to have been given: *Held*, that there was no error in the refusal of the circuit court to give the instructions.

*400] The sureties in the bond of a contractor, given to secure the performance of *a contract for the supply of the rations for the troops of the United States, are not responsible for any balance in the hands of the contractor, at the expiration of the contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds, had all been throughout blended indiscriminately by

both parties, and no separate portion had been designated, or set apart for the contract of 1818.

To say, that the sureties in the bond should be liable for the whole balance, would be to say, that they should be liable for advances made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance; each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money of A. and B. And in the present suit, there is no difference in point of law between the liability of the principal and that of the sureties upon the bond; it is the same contract, as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action in another form would lie against the contractor for any balance, however received, which remained unexpended in his hands, after the termination of the service for which the advances were made.

The receipts of the contractor, for moneys paid to him by the United States, are *primâ facie* evidence that the money was received by him on account of the contract, and it is incumbent, in action on the bond, given with sureties, for the performance of the contract, for the parties to show that the money was not paid on account of the contract as stated in the receipts; but they are not bound to show that it was so stated by mistake or design on the part of the government and the contractor, and intended to be applicable to some other contract.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

The United States instituted actions of debt, upon two joint and several bonds, dated 9th February 1818, in the penal sum of $35,000, conditioned that Benjamin G. Orr, his heirs, executors or administrators, or any of them, shall and do, in all things, well and truly observe, fulfil, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on the part and behalf of the said Benjamin G. Orr, his heirs, executors or administrators, are or ought to be observed, performed, fulfilled, accomplished and kept, comprised or mentioned in certain articles of agreement or contract, bearing date the 9th day of February 1818, *made between John C. Calhoun, secretary of war, and the said Benjamin G. Orr, concerning the supply of rations to the troops of the [*401
United States, within the state of Georgia, including that part of the Creeks' land, lying within the territorial limits of said state, according to the true intent, meaning and purport of the said articles of agreement or contract.

The defendant pleaded performance in all things to be done and performed, according to the tenor and effect of the condition of the bond. The replication stated, that the said Benjamin G. Orr, in the said condition mentioned, did not well and truly perform and fulfil the covenants and agreements comprised and mentioned in the articles of agreement referred to in the said condition of the said writing obligatory; but broke the said covenants and agreements in the following instances, to wit:

That although the said United States did advance and furnish to the Benjamin G. Orr divers large sums of money, at divers times, on account of and to enable him, the said Benjamin, to carry into effect the said articles of agreement, which said several sums of money amounted altogether to the sum of ———— dollars: And although the accounts of the said Benjamin G. Orr, in relation to the articles of agreement aforesaid had been duly and finally settled by the accounting officers of the government of the United

States; and upon the said settlement, there was found to be due to the United States, from the said Benjamin, the sum of ——— dollars.

Upon this replication, issue was joined, and a verdict and judgment rendered in favor of the defendant; and in May 1831, the plaintiffs prosecuted this writ of error.

The provisions in this contract, made by Benjamin G. Orr and the plaintiffs, upon which the breaches were assigned on the part of the United States, were the following:

1st. That the said Benjamin G. Orr, his heirs, executors or administrators, shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them, for the use of the United States, at all and every place or places where troops are or may be stationed, marched or recruited, within the limits of the state of Georgia, including that part of the Creeks' land lying within the territorial
*402] *limits of said state, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to be furnished on their march, from the 1st day of May 1818, until the 31st day of May 1819, inclusive.

3d. That supplies shall be furnished by the said Benjamin G. Orr, his heirs, executors or administrators, at the fortified places and military posts that are or may be established in the limits aforesaid, upon the requisition of the commandant of the army or a post, in such quantities as shall not exceed what is sufficient for the troops to be there stationed, for the space of three months, in advance, in good wholesome provisions, consisting of due proportions of all the articles forming the ration.

5th. That the commanding general, or person appointed by him, at each post or place, in case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued, shall have power to supply the deficiency by purchase, at the risk and on account of the said Benjamin G. Orr, his heirs, executors or administrators.

The breaches assigned were: that, although the United States had advanced to Benjamin G. Orr, at several times after the execution of the contract, several sums of money amounting to $80,000, on account of the contract and agreement entered into by him, yet he had failed to furnish and to supply to the said United States the rations which were required to be furnished by him under the articles of agreement aforesaid, or in any manner to account with the said United States for the said sums of money so advanced and furnished to him as aforesaid. And by reason of the said failure, the United States were exposed to great inconvenience, and to great and heavy losses, and were compelled to advance large sums of money for the supply of the troops of the United States, stating the several amounts advanced, and the places at which the provisions were supplied. The United States further alleged and charged, that the accounts of the said Orr, in relation to the contract aforesaid, have been duly settled by the accounting officers of the government of the United States; and upon the said settlement, there was found to be due from the said Orr to the said United
*403] States, the sum of $48,308.48; *and that the said Orr had notice thereof.

Four bills of exception were tendered on the trial, by the plaintiffs, to the opinion of the court given in charge to the jury, and were respectively

sealed by the court. The first exception set out the evidence given on the part of the United States, consisting of the bond and condition, the contract entered into by Orr, the accounts stated and settled in the proper departments of the goverment, showing the advances and payments of the sums of money to him, and vouchers, and documents in support of the same; and also, evidence to show non-performances of the agreement to deliver the provisions to the troops of the United States, at the several posts within the district designated in the contract. The account-current stated by the accounting officers of the United States, charged the contractor, with three several sums, amounting to $80,000, as follows:

1818, Feb. 19. For part of warrant No. 1660, for the payment of his drafts in favor of Richard Smith, dated 11th Feb. 1818, $55,000; March 6, for warrant No. 1733, received by him on account, $15,000; July 2, for warrant No. 2262, received by him on account, $10,000—$80,000.

The account also contained other items of debit for the costs and expenses of supplies furnished in consequence of the asserted failure of the contractor, amounting, with the advances stated, to $106,957.19. Credits were allowed in the account amounting to $58,648.71. Leaving a balance alleged to be due to the United States of $48,308.48.

No proof was offered of any requisition or notice to the contractor for the supplies at the post where the failures were alleged to have occurred. The plaintiffs showed, however, that on the 15th of January 1817, Benjamin G. Orr contracted to supply all rations required for the use of the United States troops, within the limits of South Carolina and Georgia, from the 1st day of June 1817, to the 31st day of May 1818, inclusive; and that in the execution of that contract, he had become acquainted with the number of rations required at the fixed posts; and evidence was also offered to the jury, which was intended to prove to their satisfaction on the one side, that the contractor *had dispensed with any special requisition or notice, under the last contract, and on the other, that he had always insisted [*404 on the necessity of notice.

Upon the evidence so given, the counsel for the United States prayed the court to instruct the jury, that it was competent for them to infer from the evidence, that the said Orr, in supplying the fixed posts as he had before done, under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice in relation to such supplies to said posts, and in case of failure to supply such posts according to usage and knowledge, was liable, under the bond and contract upon which this action was founded. Which last instruction the court refused to give in relation to any of the charges for failure, as aforesaid, being of opinion, that the United States were not entitled, under the said contract, to charge the said Orr for the amount paid by them for provisions, upon any supposed case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued by the said Orr, unless such failure or deficiency took place after a requisition upon the said Orr (or his agent, duly authorized by him to receive such requisition), made by the commandant of the army or a post, in case the provisions were wanted for a forfeited place or a military post; and in no case, unless such failure or deficiency took place after thirty days' notice had been given to him, or his said agent, of the post or place where the rations were wanted,

or of the number of troops to be furnished, in case the rations were wanted for marching troops. To this refusal, the counsel of the United States excepted.

The defendant, after giving in evidence the documents and vouchers in support of such of the additional credits claimed by him as had been rejected and remarked upon by the third auditor, contended (upon the grounds stated in the foregoing exception, and upon the authority of the court's said decision), that all the items of charges against said Orr, in said official accounts, under the contract of February 9th, 1818, stated, except the three advances from the treasury of $55,000, $15,000, and $10,000, first charged, and insisted upon the rejection of the same, and then claimed to
*405] have set off against the said $80,000, *and to be allowed in this suit the several sums of money admitted to the credit of said Orr, under said contracts, for provisions furnished, and expenditures, upon abstracts and vouchers, by him and his administrator exhibited to the third auditor, and claimed as credited in said official accounts, disclaiming and deducting from said credits all such as appeared to be mere counter-credits or cross-entries dependent upon the corresponding and contested charges in said accounts; and also claimed the allowance of such of the said additional credits as had been rejected and remarked on by the third auditor as aforesaid. Whereupon, the plaintiffs, by their counsel, made the following prayer to the court: That as the defendant has used the account exhibited by the plaintiffs, and have claimed the credits therein stated as allowed to the contractor, from the jury, without offering any other evidence of their claim to such credits, then the whole of said account is to go the jury, as well the charges as the credits in the said account; and if the defendant shall offer no evidence to impeach the items charged in the account, they are to be taken as correct; and that the defendant cannot rely on the account for his credits, without being bound by such entries of charge as he may be unable to impeach. Which instruction and opinion, the court refused to give; to which refusal the attorney of the United States excepted.

The defendant prayed the court to instruct the jury as follows: That if the jury find and believe from the evidence aforesaid, that the three several advances from the war department to said Orr, in the said first account above charged, to the amount of $80,000, though appearing in the receipts for the same, as made on account of this contract, were nevertheless advanced under an arrangement and understanding between the government and said Orr, to which the sureties in the bond now in suit were in no manner party or privy, that the said sums of money were to be held by the said contractor as a common fund of supplies, as well for the forts and military posts in Florida, including the subsistence of Indian prisoners there, as of the posts within the state of Georgia, and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any
*406] of both Georgia and Florida forts and military posts, upon the *terms and conditions of this contract, as if extended to the Florida posts; and that the said contractor was accordingly called on and required, in the execution of this contract, and out of the general fund so advanced nominally under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there, as for the posts within the proper

territorial limits of the contract, indiscriminately; and that both branches of supply were blended in debits for alleged failures, &c., and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the treasury and war departments, without there having been any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence, in Georgia and Florida respectively; then the obligors in the bond now in suit, or any of them, are not responsible in this action, under the tenth article of said contract, for the accounting and paying by said Orr of any balance or surplus of the said advances, remaining in his hands unexpended, at the time of the expiration of the term of said contract, in the execution of the said contract, and in the supplies of subsistence therein stipulated for; which opinion the court gave as prayed; to which the United States excepted.

The attorney for the United States prayed the following instruction. That the receipts of Orr, offered in evidence, are *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury, by evidence, that the said advances were not made under the said contract, as stated in the said receipts, but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract. Which the court refused to give as prayed, but instructed the jury, that the receipts of Orr aforesaid, were *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought, and that it is incumbent on the defendant to satisfy the jury, by evidence, that the said advances were not made under the said contract as stated in said receipts. To which refusal, the United States excepted.

*The case was argued by *Butler*, Attorney-General, for the United States; and by *Coxe* and *Jones*, for the defendant. [*407

For the United States, it was contended, that the judgment of the court below is erroneous, and ought to be reversed for the following, among other reasons:

I. The first exception was well taken. 1. It was competent for the contractor to dispense with notice—certainly so far as his own liability, which is the only question in the present suit, was concerned—and there was some evidence before the jury, from which such a waiver might have been inferred. 2. The rule laid down by the court, and their refusal to instruct as prayed, entirely withdrew that evidence from the consideration of the jury.

II. The second exception was well taken. 1. The account was one entire document, and the defendant, if he elected to rely on any part thereof, was bound, by the general rules of evidence, to take the whole as evidence, so far as it was pertinent to the subject-matter of the suit. 2. There is the more reason for adhering to the general rule in this case, because the account was stated by a public officer, to whom, by law, and by the contract of the parties, the duty of settling the accounts in question, was to be referred.

III. Admitting the premises on which the instruction stated in the third exception was given, to have been found by the jury, still the conclusion adopted by the court does not legally follow; but the principal and his

representatives may be held accountable in this action, for any balance remaining unexpended of moneys advanced in the manner suggested in said exception.

IV. The whole instruction mentioned in the fourth exception, ought to have been given as prayed.

The *Attorney-General* stated, that the first question to be examined was, whether the contractor could dispense with the notice required to be given to him, of the place where the rations were to be delivered to him, under the first part of the contract. *And secondly, whether there was evi- *408]
dence to show that he had done so.

The sureties of the contractor have nothing to do with this inquiry. There is a distinction between the rights of the principal and the sureties, in such a case as this. While the sureties might claim not to be affected by any waiver of the notice, and therefore, object to evidence of such a waiver in a suit against them, the principal can have no such right. This suit is on a joint and several bond ; and a recovery might be had against the principal, although it could not, on the same evidence, be sustained against the sureties. The suit is against the contractor Orr, and the rights of the sureties are not at all involved in it. No suit has been instituted against the sureties. The principal in a bond may be liable for the payment of the sum due upon it, and yet the surety may not be responsible. As, where the surety is an infant, a judgment against the principal would not affect him. Although a judgment in *favor* of the principal in a bond, may be evidence for a surety, it does not follow, that a judgment *against* the principal is evidence against a surety. Norris' Peake 73. The undertaking of the surety is collateral ; and if the principal is acquitted of his responsibility, that of the surety is at an end for ever. While it is admitted, that the construction to be given to the bond, is the same in an action against the principal as against the surety, yet the evidence which is admissible, when the remedy is sought against the principal, may be different.

It will not be denied, that so far as Orr was interested in the consequences of a waiver of the notice, he could waive it. The notice required in the contract, was a condition precedent ; it was for the benefit of Orr, to prevent his being subjected to the consequences of a unexpected demand for provisions, and at a place where he had not prepared to deliver them, and did not know beforehand they would be required at a particular period. But when, from circumstances previously within his knowledge, from his having, under a previous contract, become perfectly informed of the wants of the army, and the extent of those at "the fixed posts," all the inform- *409]
ation which *notice could give him was already in his posssession, no notice was then necessary. The alleged waiver did not vary the construction. Suppose, a memorandum had been indorsed on the contract by Orr, dispensing with the thirty days' notice ; this would not have been a new contract.

It is admitted, the inquiry must be confined to the issue made in the replication, where the breaches are assigned ; but the matter relied upon to show a waiver is embraced in the assignment of the breaches. The replication refers to the contract, and it covers all advances made to the contractor.

No opinion upon the weight of the evidence was asked. The evidence was given, from which, it was claimed, that the jury might infer the waiver, and the court was requested to charge the jury, that they might decide, if notice had been waived; but the court, instead of this, decided, and did instruct the jury, that Orr could not waive notice. The instruction asked for should have been given; which was, that it should be left to the jury to infer, whether there was any evidence, express or implied, by which a waiver of notice could be inferred.

The attorney-general then went into an examination of the evidence; from which, if they had been permitted so to do by the court, a waiver of notice might be inferred. He said, the weight of the evidence might have been against the waiver, but this should have been left to the jury. But the court said, in no case can there be a recovery, without proof of previous notice of the quantity of provisions wanted. 3 Munf. 352.

As to the second exception. The general rule is, that one party cannot take advantage of a portion of the contents of a paper produced by the other party, without admitting the whole of the contents. The whole is made evidence, so far as it is applicable to the matters in controversy. It is immaterial, who introduces the evidence. The rule grows out of the fact, that the paper is one entire account. The introduction of it, is the introduction of one single document; and the rule rests on the general principle, that a confession must be taken together. The United States have never admitted the credits separated from the debits.

*Upon the third exception, it was contended for the United States, that the three payments, amounting to $80,000, were made on the [*410 contracts of Orr with the government, promiscuously; and the instruction asked was, that the jury might find what was advanced for the Florida, and what for the Georgia posts (there were fixed posts in both); and thus discriminate between the contracts. This was a proper subject for the jury, and the court ought not to have excluded the examination. 3 Johns. 528.

The fourth exception was properly taken. Why should not the whole instruction have been given? The defendant ought to have shown by evidence, that the advances of $80,000 were not made under the contract. The receipts of Orr were *primâ facie* evidence, and if there was mistake or design on the part of the government, or of Orr, in stating them; then, that they were applicable to some other contract should have been shown.

Jones and *Coxe*, for the defendant, denied, that on a joint and several bond, a recovery can be had against the principal, when the surety is not liable. There is no distinction between the principal and the surety in such an obligation. The obligation and contract are one although there may be several remedies. 4 Bac. Abr., tit. Obligation, D, 4, 165, 167, note. A judgment in a several suit against the principal, will conclude the sureties; and an acquittal of the principal, it is admitted, will discharge the sureties. A judgment against the principal, would be evidence against the sureties, in a separate action against them. 2 Stark. 196. If any distinction ever exists, it must grow out of something *dehors* the bond, either before or after its execution, and relate to the remedy.

This case is to be looked at, as if Orr had given the bond alone; and it must be admitted, that each party to a joint and several bond can act only

for himself; he may waive any claims he has under it, for himself, but for no other party to it. The waiver dispenses with the proof of performance of a condition precedent, and as founded on the principle, that the condition had been performed. But it is denied, that the condition in the contract *411] was precedent. It was a substantial independent *agreement, to supply such provisions as should be required from Orr, on thirty days' notice. Strike this out, and the contract would be without sense.

But the court was not called upon to decide upon the operation of the alleged waiver. It was asked to decide, that it was competent for the jury to infer, that the notice was waived. This was asking the jury to infer a legal consequence. A military "post," where rations were to be delivered, affords no evidence of the quantity of provisions wanted there. Changes in the number of the garrison may occur, so as to augment or diminish the number of rations wanted; and the deliveries of 1817, would furnish no evidence of what would be required in 1818. The same provision as to notice, was contained in both contracts; and no evidence was offered to show, that deliveries under the contract of 1817, were made without notice.

The second exception presents the question, whether the defendant, by using the account as to the credits contained in it, made the debits in the same account, evidence against him. The distinction is, whether the evidence is offered by the party claiming the benefit of the admission, or by the opposite party. The evidence was introduced by the United States. This gave the defendant the right claimed. It is but justice to a party against whom a treasury account is exhibited, such as that relied upon by the plaintiffs, that the credits contained in it should be used by him as evidence, without prejudice to his right to object to the debits. On the examination of the account by the officer who has to adjust his account at the treasury, all the original vouchers exhibited by him are surrendered, and remain there. When the credit has been admitted, the party cannot be deprived of it.

The third instruction claimed by the plaintiffs, and which is the subject of the third exception, assumes, that there was to be a common fund for the posts in Florida and Georgia. The advances were not, therefore, made upon the contract now in question, and they are not covered by the bond on which this suit is brought. The contract does not extend to supplies in Florida, and no account was exhibited, as settled for advances made upon this contract exclusively. Such an account would have been proper, and *412] was necessary to enable the jury to *decide upon the extent of the defendant's responsibility. There was no error in the action of the circuit court in this matter.

The instructions given to the jury, and which are complained of in the fourth exception, are more favorable to the United States, than was warranted by the facts. The jury have by their verdict found the fact, that there was a blending of the advances, and that the advances were not made under the Georgia contract only.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia for the county of Washington. The original suit was brought on a bond given by Orr, and certain persons as his sureties, to the United States, on the 9th of February

1818, for the penal sum of $35,000, upon condition, well and truly to perform, &c., certain articles of agreement, dated the same day &c., "made between John C. Calhoun, secretary of war, and the said Orr, concerning the supply of rations to the troops of the United States within the state of Georgia, including that part of the Creeks' lands within the territorial limits of said state, according to the true intent and purport" thereof. The defendant Orr died pending the suit, and it being revived against his administrator, the latter, after *oyer* of the bond and condition, and articles of agreement, pleaded a general performance of the condition by Orr; and the replication assigned for breach, that although the United States did advance and furnish to Orr, divers large sums of money at divers times, on account of, and to enable him to carry into effect, the articles of agreement; and although the accounts of Orr, in relation to the articles of agreement, had been finally settled by the accounting officers of the government and upon the settlement, there was found due to the United States the sum, &c.; yet he had not paid the same, &c. Upon this replication, issue was joined; and the cause being tried, a verdict was found for the administrator, upon which judgment was afterwards given by the court in his favor. At the trial, several bills of exception were taken on behalf of the United States; and the validity of these exceptions constitutes the matter now in controversy before this court.

*The first article of the articles of agreement above referred to, is to this effect: "That the said Orr, his heirs, &c., shall supply and issue all the rations, to consist of the articles hereinafter specified, that shall be required of him or them, for the use of the United States, at all and every place or places, where troops are or may be stationed, marched or recruited, within the limits of the state of Georgia, including that part of the Creeks' land lying within the territorial limits of said state, thirty days' notice being given of the post or place where rations may be wanted, or the number of troops to be furnished on their march, from the 1st day of June 1818, until the 31st day of May 1819, inclusive, at the following prices, &c." The tenth article provides, "that all such advances of money, as shall be made to the said Orr, &c., for or on account of the supplies to be furnished, pursuant to this contract, and all such sums of money that the commanding officer of the troops or recruits, &c., may cause to be disbursed, in order to procure supplies, in consequence of any failure on the part of the said Orr, &c., in complying with the requisitions herein contained, shall be accounted for by him or them, by way of off-set against the amount of such supplies; and the surplus, if any, repaid to the United States, immediately after the expiration of the terms of this contract, together with interest, &c.; and, that if any balance shall, on any settlement of the accounts of Orr, &c., be found due by him or them, &c., the same shall be immediately paid. [*413

At the trial, the United States, in support of their suit, introduced certain official accounts and statements of the third auditor, duly certified from the treasury department, which were read in evidence, saving to the defendant all exceptions to the competency of these accounts to charge him, otherwise than as the items of charges in the same should be supported by proof. The United States also read in evidence a contract made by Orr, in January 1817, for army supplies for the state of South Carolina and Georgia for one year, from the 31st day of May 1817; the terms of which contract are the

same as those of the contract of 1818. Besides evidence to other points, not now material to be stated, the United States introduced the testimony of a Mr. Abbott, and proved by him, that at the time when contracts were made for the supply of the United States troops, the contractors (as he believed)
*414] were then informed of *the fixed posts within the limits of the contract, and the number of troops there stationed, and that rations were to be regularly supplied by such contractor, according to the number of troops so stationed at such places; and that the contractor was informed he was to continue so to do, without any other notice; and that special requisitions and notice of thirty days would be made and given for all other supplies, at other places or posts, and for any change in the quantity of supplies which might become necessary at the fixed posts, from a change in the number of troops stationed at such fixed posts; and that such was the understanding at the war department, in settling the accounts of contractors. But he did not know of any verbal explanation between the secretary of war and Orr on this subject, specifying anything, more or less, than what the contract specified; and he did not know that there had been any submission or agreement of contractors to such a construction of their contracts; but that such was the rule adopted by the accounting officers in settling the accounts of contractors.

The defendant, among other things, introduced evidence to show, that Orr always insisted on the necessity of requisitions and notices, according to the terms of the contract, for supplies at all posts, before he could be charged with a failure; and also to show the custom of making requisitions, and giving such notices for supplies at all posts, where provisions were required, and without regard to their being old established posts, or new ones established after the contract.

After the whole evidence was closed, the attorney for the United States prayed the court to instruct the jury, "that it was competent for them to infer from the said evidence, that the said Orr, in supplying the fixed posts, as he had before done under his former contract, and knowing thereby the number of rations there required, dispensed with any special requisition and notice, in relation to such supplies to said posts; and in case of failure to supply such posts, according to usage and knowledge, is liable, under the bond and contract upon which this action is founded." The circuit court refused to give this instruction, and the question now is, whether it ought to have been given?

To the terms in which this instruction is couched, there is certainly a
*415] well-founded objection. The language used is *equivocal, and admits of various interpretations; and it is certainly the duty of the party asking an instruction, to express it with such certainty as may not mislead either the court or the jury. The court were asked to instruct the jury, "that it was *competent* for them to infer from the said evidence, &c." Now, if by "competent," as here used, it was intended, that there was sufficient evidence from which the jury might infer a waiver or dispensation, &c., the instruction was manifestly wrong, for it required the court to decide upon the weight of evidence, and to take from the jury the right to ascertain that which is peculiarly within their province, for themselves. But if it was only intended to express, that there was evidence conducing to prove a waiver, the language was ill adapted to the purpose; for it does not ask,

whether the evidence introduced on the part of the United States, if believed, conduced to such a purpose, but whether the evidence on both sides conduced to such a purpose, which would require the court to ascertain, in like manner, the weight of the evidence; for it could not be correctly affirmed, that the evidence conduced to such a purpose, where there was conflicting evidence, unless there was a decided preponderance on that side.

But without dwelling more on the phraseology of this instruction, we are of opinion, that the court were correct in refusing it, upon the substance of the doctrine asserted in it. The court were required to instruct the jury, that it was competent for them to infer, that Orr had dispensed with any special requisition and notice, in relation to supplies at fixed posts, not from the evidence generally, but from two special circumstances in the case; first, from having supplied the fixed posts, as he had done, under his former contract (that is the contract of the preceding year, 1817), and secondly, from thus knowing the number of rations there required. Now, the contract of 1817 entitled him to have requisitions and notices of thirty days, precisely in the same manner as the contract of 1818 did, and it was neither proved nor admitted in the case, that such requisitions and notices had not been given under the former contract. If they had been given, then, certainly, there could be no legal inference, that they were not to be continued to be given under the contract of 1818. And if they were not given, then the circumstance *that they had been dispensed with, under a former [*416
contract, had no legal tendency to establish that they were dispensed with under a new and independent contract. Indeed, the very circumstance, that in some new and independent contract they were stipulated for, would furnish proof, that they were not intended to be dispensed with. Why otherwise should they be again inserted in the contract? Certainly, not for the purpose of showing, that they were not to be insisted on, but were to be dispensed with.

Besides, the fact of having supplied the fixed posts under a former contract, and knowing thereby the number of rations then required for them, could have no legal tendency to establish the right or duty of the contractor to supply the same posts with the same number of rations in future years. The number of troops might be varied; the importance of those posts might be diminished or increased; and from the nature of the military service, many other circumstances might occur, to render a fixed quantity of supply at those posts, incompatible with the public interests or public necessities. The very language of the contract demonstrates, that no such fixed quantities could have been contemplated by the parties. The contractor is to supply and issue all rations, which shall be required of him "at all, and every place or places where troops are or may be stationed, &c., thirty days' notice being given of the post or place where the rations may be wanted, or the number of troops to be furnished on their march." So that the contract not only does not look to any fixed posts in particular, but it carries on its face an implication, that the supply required might or would be varied in all posts and places.

Upon these grounds, we are of opinion, that the circuit court were right in refusing the instruction prayed for. We give no opinion upon the point, whether a parol waiver of the notice stipulated for in the contract would, if proved, have entitled the United States to recover in this suit, it being a suit for a forfeiture for non-fulfilment of the terms of the contract. Even

supposing a waiver by parol may discharge the party, so as to save a forfeiture of a bond, it does not follow, that a waiver by parol is to be admitted, to create a forfeiture of a bond. On neither point, do we mean to express any opinion.

*417] The next exception involves the same point relative to the *right of the defendant to have the credits allowed him on the treasury accounts, notwithstanding a rejection of some of the debits which was involved in another case between the same parties, in which my brother McLean has already delivered the opinion of the court.

The next exception is to an instruction of the circuit court, given upon the prayer of the defendant. It is as follows: "That if the jury find and believe from the evidence aforesaid, that the three several advances from the war department to the said Orr, in the said first account above charged, to the amount of $80,000, though appearing in the receipts for the same as made on account of this contract, were, nevertheless, advanced under an arrangement and understanding with the government and said Orr, to which the sureties in the bond now in suit, were in no manner party or privy; that the said sums of money were to be held by the said contractor as a common fund of supplies, as well for the forts and military posts in Florida, including the subsistence of the Indian prisoners there, as of the posts within the state of Georgia, and the Creek lands within the territorial limits of that state, and to be indiscriminately applied to all or any of both the Georgia and Florida forts and military posts, upon the terms ond conditions of this contract, as if extended to the Florida posts; and that the said contractor was accordingly called on and required, in the execution of that contract, and out of the general fund so advanced, nominally, under this contract, to furnish subsistence as well for the Florida posts, including Indian prisoners there, as for the posts within the proper territorial limits of the contract, indiscriminately; and that both branches of supply was blended in debits for alleged failures, &c., and credits for supplies in the same official account of advances and expenditures under this contract, as kept at the proper accounting departments of the treasury and war departments, without there being any specific part or portion of the said advances designated and set apart for the two branches of supply and subsistence in Georgia and Florida respectively; then the obligors in the bond now in suit, nor any of them, are not responsible in this action, under the tenth article of said contract, for the accounting and paying by said Orr of any

*418] balance or surplus of the said advances, remaining *in his hands, unexpended, at the time of the expiration of the term of said contract, in the execution of the said contract, and in the supplies of subsistence therein stipulated for."

Stripped of the complicated circumstances in which this instruction is involved, it presents the simple question, whether, under the tenth article of the contract of 1818, the parties to the bond are, in the present action, responsible for any balance in the hands of Orr, at the expiration of the same contract, of advances made to him, not on account of that particular contract exclusively, but on account of that and other contracts, as a common fund for supplies, where accounts of the supplies, the expenditures and the funds had all been throughout blended indiscriminately by both parties, and no separate portion had been designated or set apart for the contract of

1818. We are of opinion, that the question ought to answered in the negative; and that, therefore, the instruction given by the circuit court was correct. The tenth article of the contract of 1818 declares, that all advances made "for and on account of the supplies to be furnished, pursuant to this contract," shall be duly accounted for. Now, advances made as a common fund for supplies under that and other contracts, without any discrimination or apportionment for either in particular, can, in no just sense, be said to be advances made for supplies "pursuant to the contract" of 1818. The whole fund might, if necessary, be rightfully applied for any purpose within the scope of either contract. The unexpended balance is not the balance of any appropriation or advances under any particular contract, but constitutes a common fund for all remaining purposes under any contract. If it were wanted for supplies for the Florida posts, there would be no pretence to say, that it was a balance, for which the parties were responsible in the present suit. And if not wanted for such a purpose, still, to fix responsibility upon them, according to the terms of their engagement, it must be shown, that the balance was a balance, remaining unexpended, of advances under the contract of 1818. But how is that to be shown, when no distinct advances were made, no distinct expenditures required, and no distinct accounts kept under that contract? To say, that the parties to the present bond should be liable for the whole balance, would be to say, that they should be liable for advances *made under any other contracts; and if not liable for the whole, the very case supposed in the instruction precludes the possibility of any legal separation of the items of the balance. Each and all of them are blended, *per my et per tout*, as a common fund. The case, indeed, in the principles which must govern it, ranges itself under that large class of cases, where a party, bound for the fidelity of a clerk or other agent of A., as keeper of his money or accounts, is held not liable for acts done as the keeper of the money or accounts of A. and B. And in the present suit, there is no difference in point of law, between the liability of the principal, and that of the sureties upon the bond. It is the same contract as to both; and binds both or neither. The United States are not, however, without remedy; for there can be no doubt, that an action, in another form, would lie against Orr, for any balance, however received, which remained unexpended in his hands, after the termination of the service for which the advances were made. [*419

The next exception is, to the refusal of the circuit court to instruct the jury, "that the receipts of Benjamin G. Orr, offered in evidence, are *primâ facie* evidence that he received the $80,000 under the contract on which this suit is brought; and that it is incumbent on the defendants to satisfy the jury, by evidence, that the said advances were not made under the said contract, as stated in the said receipts; *but that it was so stated by mistake or design on the part of the government and said Orr, and intended to be applicable to some other contract.*" The court gave the instruction as prayed, omitting only the last clause as to the mistake or design of the parties. And we are of opinion, that the instruction, as given, was all that the United States had a legal right to require. If the advances were not made under the contract, as stated in the receipts, the parties to the bond were not responsible therefor, and it was wholly immaterial to them, how it occurred; whether it was by mistake or design, or otherwise. The receipts were *primâ facie*

evidence that the money was received under the contract; and it was incumbent on the defendants to establish the contrary by competent proofs.

Upon the whole, the opinion of the court is, that the judgment of the circuit court ought to be affirmed.

Judgment affirmed.

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*420] *William C. Holt and wife, Appellants, *v.* Thomas and Edmund Rogers.

Specific performance.

Construction of a contract for the sale of a tract of land. R. executed a bond to D. conditioned that he would make him a fair and indisputable title to a certain tract of land, on or before the 1st of January 1795; and if no conveyance was then made, that R. would stand indebted to D., in a certain sum of money, being the sum acknowledged to be paid to R. at the time of the contract. No other just interpretation can, under the circumstances, be put upon this language, than that the parties intended, that R. should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to D., on or before the 1st of January 1795; and if not then made, the contract of sale was to be deemed rescinded, and the forty-five pounds purchase-money was to be repaid to D.

In 1799, the heir of the vendor, he having died, obtained a complete title to the land by patent, and the vendee did not die until seven years afterwards; after his death, in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim to a performance of the contract for the sale of the land, until 1819; and no suit was commenced until 1823; in the meantime, the property had materially risen in value, from the general improvement and settlement of the country. The objection from the lapse of time, is decisive; courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances; even where time is not of the essence of the contract, they will not interfere, where there have been long delay and *laches* on the part of the party seeking a specific performance; and especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill is brought after a lapse of twenty-nine years.[1]

Appeal from the Circuit Court of Tennessee. The case, as stated in the opinion of the court, was as follows:

The suit was brought in February 1823, for a specific performance of a contract, made in January 1794, for the sale of land, under the following circumstances. On the 6th of January 1794, John Rogers, of Virginia, executed his bond to James Dickinson, of the same state, in the penal sum of 2000*l.* upon condition, after reciting that Rogers had, on that day, sold
*421] to Dickinson, a tract of land, lying in Kentucky, *containing about 1200 acres, for 120*l.* that if Rogers, his heirs or assigns, shall make, or cause to be made, to Dickinson, or his assigns, a good and lawful deed for the land, when required, then the obligation to be void. On the same day, Dickinson executed to Rogers a counter-bond, in the penal sum of 240*l.*, upon condition, after reciting the sale of the same land to Dickinson, and the receipt by Rogers of 45*l.*, part of the consideration money, "that if Rogers shall, on or before the 1st day of January 1795, make a fair and indisputable title in fee-simple to Dickinson, &c., of the said tract or parcel of land, and Dickinson, after that conveyance being made, shall pay to Rogers the further sum of 75*l.* lawful money; but if no such conveyance of said land shall be made, then the said Rogers stands indebted to the said

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[1] Dorsey *v.* Packwood, 12 How. 126; Harkness *v.* Underhill, 1 Black 316; McNeil *v.* Magee, 5 Mason 244; Bronson *v.* Cahill, 4 McLean 19; Mason *v.* Wallace, Id 77.