aforesaid, and become parties in the cause under this order; and such other proceedings are to be had in the said cause by the said court, as to law, equity and justice shall appertain.[1]

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*The CHESAPEAKE AND OHIO CANAL COMPANY, Plaintiffs in error, [*541
v. ABRAHAM KNAPP and others.

Assumpsit.—Bill of particulars.

An action of *indebitatus assumpsit* was instituted to recover a large sum of money, alleged to be due for the construction of certain locks, &c., on the Chesapeake and Ohio canal; the defendants pleaded the general issue, and called on the plaintiffs for a bill of particulars; the item of claim upon which the jury gave a verdict for the plaintiffs, was stated in the bill of particulars to be, "detention and damage sustained for want of cement on locks No. 5 and 6."

There is no doubt, that a bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded; this is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant rather than to enlighten him.

As the bill of particulars is filed before the trial, it is always in the power of the defendant to object to its want of precision, and the court will require it to be amended, before the commencement of the trial; and if this be not the only mode of taking advantage of any defect in the bill, it is certainly the most convenient for the parties.[2]

Although this bill of particulars does not specify, technically and fully, the grounds on which the plaintiffs claim damages, it sufficiently expresses to the defendants that the claim arises for want of cement on locks No. 5 and 6.

The ancient doctrine, that a corporation can act, in matters of contract, only under its seal, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it and subject it to an action of *assumpsit*.

There can be no doubt, that when a special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration; but if the contract has been put an end to, the action for money had and received lies to recover any payment that has been made under it.

It is a well-settled principle, that where a special contract has been performed, a plaintiff may recover on the general counts.

The court ought not to instruct, and, indeed, cannot instruct, on the sufficiency of evidence; but no instruction to the jury should be given, except upon evidence in the case. Where there is evidence on a point, the court may be called upon to instruct the jury on the law, but it is for them to determine on the effect of evidence.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. This was an action of *assumpsit*, instituted originally in the county court of Montgomery county, in the state of Maryland; and by

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[1] For the further proceedings in this case, which was finally decided by a divided court, on the question of domicil, see Packer *v.* Nixon, 10 Pet. 408; Aspden *v.* Nixon, 4 How. 467; White *v.* Brown, 1 Wall. Jr. C. C. 217; Brown *v.* Aspden, 10 How. 25; and Aspden's Estate, 2 Wall. Jr. C. C. 368, 451–2.

[2] Bills of particulars may be ordered in all cases; an application therefor is the appropriate proceeding, where a party seeks to be apprised of the particulars, or circumstances of time and place, set forth in his opponent's pleading. People *v.* Nolan, 10 Abb. N. C. 471. It may be ordered, in a criminal case, where the indictment fails to give notice to the defendant of the specific matters intended to be proved against him. Williams *v.* Commonwealth, 91 Penn. St. 493. It must be sufficiently full to disclose the gist of the plaintiffs demand. Gilpin *v.* Howell, 5 Id. 41. It is not, however, the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but merely to identify the items embraced in his claim. Seaman *v.* Low, 4 Bosw. 337. Its office is merely to limit the generality of the complaint, and prevent a surprise on the trial, not to furnish evidence. Drake *v.* Thayer, 5 Rob. 694; Fullerton *v.* Gaylord, 7 Id. 551.

agreement of the parties, transferred, with all the pleadings, depositions and other proceedings therein, to the circuit *court of the United States for the county of Washington, in the district of Columbia.

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The declaration contained nine counts: the first, second and third, for goods sold and delivered; the fourth, fifth, eighth and ninth, for work, labor and services, and for materials furnished, &c.; the sixth, for money paid, laid out and expended, and for money had and received for the use of the plaintiffs; and the seventh, an *insimul computassent.* The defendants pleaded *non assumpsit,* and issue was joined thereon. A rule having been entered on the plaintiffs to file a bill of particulars, the same was duly filed, setting forth all the items of claim against the defendants.

The plaintiffs in the circuit court had, on the 4th day of May 1829, entered into articles of agreement with the Chesapeake and Ohio Canal Company, to execute certain sections of the canal, then being made by the company, according to certain specifications before agreed upon by the parties. Under this agreement, the plaintiffs constructed eight locks on the canal, and this action was brought for the value of the work done, and materials expended on the same, and for other matters which had arisen under the agreement. The only item in the bill of particulars which was deemed material, and which came under examination and discussion by the counsel and the court, in the argument and decision of the cause, was the following: "To detention for want of cement, at proper times, at locks No. 8, 15, 16, 17, 18 and 20; damages sustained in consequence of such detention, $600."

The defendants in error read in evidence the specification for lock No. 6, and their offer to contract for the construction of the said lock, on the terms therein stated; and also a paper containing their proposal to execute the said lock, according to the plan and the specification; and they proved, that the proposals were accepted. They also read the agreement between them and the canal company, dated the 4th of May 1828, for the construction of the work pursuant thereto: and also like specifications and proposals, and their acceptance by the parties, for the execution of the other eight locks, and the contract for the same; the execution of the work to be done by them under the said contract, being also proved. The specifications particularly described the work to be done, the *materials to be used, and the manner and time of its execution. In the specifications, there was inserted the following: "It is believed, that hydraulic cement, suitable for the construction of lock masonry, may be obtained on the Potomac, as far east as Shepherdstown. Its average cost, it is presumed, will not exceed forty cents the bushel, delivered at the shore opposite the locks; should it be found not suitable for the purpose, and it become necessary to import the New York hydraulic cement, or Parker's Roman cement, the president and directors will furnish to the contractor cement so imported, in good season, say, by the 1st of May 1829, at the price of forty cents the bushel, which shall be deducted from the sum to be paid for the lock, if the contractor furnished the cement himself. The extent of its use, if it be so applied, may be limited by the engineer to a certain distance from the face of the wall." The proposals stated the price at which the work was to be done; and the agreement set forth stipulations for the performance of the work, and

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the sums to be paid for the same ; with other matters to secure and define the obligations of the parties thereto.

The plaintiffs also offered, and read in evidence, the following resolution of the president and directors of the canal company, passed the 2d day of September 1829 : "Ordered, that the board will furnish water lime to such contractors for masonry as shall provide houses to receive it, to be delivered at the river shore, opposite to their works, at forty cents per bushel." And also the following resolution of the said president and directors, passed the 20th of January 1830. "Resolved, that although this board has stipulated to supply the contractors with water lime, yet the board will not be held responsible for any damage arising from the want of that article."

And also the answer of Theophilus Williams, to an interrogatory on the part of the plaintiffs. "To the thirty-second annexed interrogatory, this deponent replies, that the plaintiffs were very greatly hindered in their operations, by the want of cement. This deponent has no written memoranda of the time which the plaintiffs were so hindered, but believes that the time lost by the failure of the *defendants to furnish cement, was not less than one-third of the whole time from the 1st of April to the 1st of August 1830 ; and this deponent can further state, that the opinion of the late resident engineer, Daniel Van Slyke, Esq., agreed with that of this deponent above stated, as to the proportion of the time lost by the plaintiffs for want of cement. Orders were given to the plaintiffs not to discharge their men, when idle for want of cement, but to retain them all, under pay, until a supply could be procured. This order had not reference to any one particular time when the plaintiffs were hindered for want of cement. The deponent was directed by the resident engineer to communicate the order to the plaintiffs, and did accordingly communicate it to them. This was the usual course of transmitting orders to the contractors for the different works on the Chesapeake and Ohio canal. This deponent received the same order, at several different times, from the president of the company. It was reiterated to the plaintiffs, at various times, and was, as this deponent believes, strictly complied with by them. This order, as well as that referred to in the answer to the twentieth, was, according to this deponent's recollection, verbally given. This deponent cannot state with accuracy, to what extent the plaintiffs were delayed for want of cement, previous to the 1st of April, but thinks there was some considerable, for want of cement, before that time. From what this deponent recollects of the number of men and teams employed by the plaintiffs, and the high wages paid to laborers generally, and more particularly to mechanics, and the expense of subsisting men and teams, this deponent is fully convinced that, including the wages of laborers and mechanics, the subsistence of men and teams, and the wear and tear of tools, the expense of the plaintiffs must have averaged, while hindered for want of cement, from one hundred and fifty to one hundred and seventy-five dollars a day. The deponent cannot say with exactness, what number of days the plaintiffs were compelled to suspend their operations for want of cement, but thinks the whole detention may have been equal to from thirty to forty entire days."

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And also the answer of Milo Winchel, to an interrogatory on the part of the plaintiffs. "To the ninth interrogatory, this deponent, answering, says, that the defendants delivered the cement very irregularly, in small

quantities, which caused very great hindrance and loss *of time, and expense to these plaintiffs, by keeping a very large force of mechanics, common laborers, and teams, lying idle, and upon expense of wages and board, whilst waiting for cement; the precise loss and damage incurred deponent cannot state, but, from his best recollection, would say, that the loss of time thus incurred, from the 1st of March 1830, until the completion of the said locks in August, therefrom, could not be less than forty days, at an expense to these plaintiffs of from one hundred and sixty dollars to one hundred and seventy dollars per day; besides, the damage was very serious by delaying the work until the sickly months of July and August, which was the cause of a great advance in all kinds of labor, to induce laborers to remain upon the line of the canal at this season of the year; all this expense and risk might have been saved to these plaintiffs, had the cement been furnished as agreed on the part of the defendants, which would have enabled the plaintiffs to have completed the whole of their work early in June 1830."

And also the answer of Henry Smith, to an interrogatory on the part of the plaintiffs. "To the eleventh interrogatory this deponent will answer, that much delay was occasioned to the plaintiffs by the non-delivery of cement, in quantities to meet their demands; the consequence was, they were compelled to keep their hands, under pay, without labor, and deferring the completion of their work until the more sickly season, when labor, if procured at all, was obtained at an advance from twenty to thirty-three per cent. It is believed by this deponent, that if sufficient quantities had been delivered in season, that the locks would have been completed by the 4th of July. That, at the time locks Nos. 18 and 20 were in progress, the plaintiffs often complained of a scarcity of cement, and one particular time they were lying idle for a number of days, with a large force of hands, and, as deponent understood at the time, they were all under pay from the plaintiffs. The number of days alluded to above is believed to be two weeks or more; and many other times deponent knows of there being a want of cement, but the aggregate cannot be positively stated."

And also the answer of Moses Randal, to an interrogatory on the part of the plaintiffs. "To the eighth interrogatory hereunto annexed, this *546] *deponent, answering, says, that these plaintiffs were greatly hindered and delayed, nearly the whole time they were employed in building these locks, by the irregular manner in which the cement was delivered, and that the amount of such hindrance upon locks Nos. 15, 16, 17, 18 and 20, from the 1st of March 1830, till their completion in August following, was not less than forty entire days, at an expense to these plaintiffs of one hundred and seventy dollars per day. There were eighteen days at one time, in which the plaintiffs received but two small loads of cement for the use of two hundred men, being insufficient to supply them one day; besides, the damage was very serious by protracting the work until the sickly months of July and August, which was the cause of a great advance in all kinds of labor, to induce the laborers to remain upon the line of the canal at this season of the year. All this risk might have been saved to these plaintiffs, had the cement been furnished as promised on the part of the defendants, which would have enabled the plaintiffs to have completed their whole work early in June 1830; and deponent further says, that the plaintiffs suffered

great hindrance and loss by the interference of the work under Messrs. Bargy & Guy, on section 18, by the breaking of the face-stone, by coming in contact with their carts and wagons, and by the men being driven from their work many times in a day to escape the dangers from the heavy rock blasting upon said section; the damage done to the plaintiffs during this interference, deponent cannot precisely state, but knows it was great. This deponent recollects that, in one instance, on lock 18, a large rock was thrown against the wing wall of the lock, and so deranged several courses of their work as to require relaying; in several other instances, the work of the plaintiffs on locks 17 and 18, was deranged by the falling stones breaking and displacing the cut stones in the wall. The plaintiffs remonstrated against these injuries, and threatened to abandon the work, in consequence of which, Daniel Van Slyke, the agent of the defendants, agreed to indemnify them against all damages arising from this source."

And also the answers of Benjamin Wright, to interrogatories put to him by the plaintiffs. "To the ninth interrogatory, he saith, that he knows, that in many cases, the cement was very bad; in others, the same was damaged, by having been allowed to get wet, before *delivery to the plaintiffs. That it was furnished by the defendants in small quantities, and in a [*547 very irregular manner; and in many cases, not furnished at the times agreed upon between the plaintiffs and defendants; it being expressly understood between the plaintiffs and defendants, that the cement should, at all times, be furnished as it was required for the prosecution of the work. To the tenth interrogatory, he saith, that he knows the plaintiffs were put to serious loss and damage, in consequence of the failure of the defendants in supplying cement, as stated in the last interrogatory, the said plaintiffs being obliged to keep their laborers and mechanics in pay, when they were actually unemployed, said plaintiffs being in the daily expectation of receiving the said cement; which state of things continued, in some instances, for a week together, and at others for two, four and six days; and deponent further knows, that, in consequence of such failure on the part of the defendants to furnish the cement, at the periods agreed upon, the work of the plaintiffs was necessarily protracted to the sickly part of the season, which necessarily caused a great increase in the wages of the mechanics and laborers, to induce them to remain during the said period. Deponent further saith, that he knows that the president of the company, on many occasions, directed the plaintiffs not to dismiss their men, stating, from time to time, that he would have cement furnished, which, in many cases, was not furnished in compliance with his assurances; but deponent cannot say, what was the actual loss incurred by the plaintiffs, although, as above stated, he believes it to have been very serious."

Upon which testimony, the plaintiffs prayed the court to instruct the jury, and they did, on the said prayer, instruct the jury, that if the jury believed, from the said evidence, that the defendants had, on the 2d day of September 1829, and from that time until the 20th day of January 1830, contracted with the plaintiffs to furnish them with cement, &c., in due time, &c., and that the plaintiffs, expecting that sufficient supplies of cement to go on with the work would be furnished by the defendants, as defendants had so engaged to do, hired a large number of hands, and brought them to the locks, and when the defendants had so failed to furnish the cement, kept

the same hands idle, waiting for cement, on the defendants' *desire that they should do so, in order to be ready to go on with the work, and paid them their wages while so waiting; then the plaintiffs were entitled, under the count for money laid out and expended, contained in this declaration, to recover the money so paid to said hands, during such periods. But that the plaintiffs were not entitled to recover for wages paid to their workmen on account of a deficiency of cement, after the said 20th day of January 1830, unless the jury should be satisfied by the said evidence, that the said resolution of the board of directors, of the 20th of January 1830, was rescinded by the said board, and a new contract entered into thereafter by the defendants, to furnish cement to the plaintiffs, and the subsequent failure on their part so to furnish it, and an agreement also to pay for the wages of the plaintiffs' workmen, while so waiting, and so forth. The defendants excepted to this instruction.

The jury found a verdict for the plaintiffs of $20,707.56; on which judgment was entered by the court; and the defendants prosecuted this writ of error.

The case was argued by *Coxe* and *Southard*, for the plaintiffs in error; and by *Key* and *Webster*, for the defendants.

The counsel for the plaintiffs in error contended, that the court erred in giving the instruction: 1. Because there was no notice or intimation given by the plaintiffs to the defendants, in their bill of particulars, of charge against the defendants for money laid out or expended, in the payment of wages to workmen, while kept idle waiting for cement. 2. Because the court, in the said instruction, has adjudged on a matter of fact, and told the jury, that the defendants had engaged or contracted to deliver cement at certain times and prices, and had failed to furnish the said cement; which said facts ought to have been left to the jury upon the evidence. 3. Because, admitting the existence of such a contract, and the failure to comply therewith on the part of the defendants; the payment of wages by the plaintiffs to their workmen while idle, waiting for cement, and the loss thereby could only be *recovered in a distinct action by the plaintiffs against the defendants, for the breach of such contract. 4. Because the court, in the said instruction, has submitted the fact of an agreement on the part of the defendants, to pay for the wages of the plaintiffs' workmen, while so waiting and idle; without any evidence of such an agreement being proved or offered to be proved.

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Coxe, for the plaintiffs in error, stated, that the amount of the sum originally claimed by the plaintiffs in the circuit court, was $141,000 and upwards; and most of the items in their claim were rejected; so that the demand was reduced to comparatively an inconsiderable sum It was upon the instructions of the court, which are for examination here, that the recovery was had by the verdict of the jury. There was a contract in writing between the parties, and the evidence proved a full performance of every part of it, in every particular, by the plaintiffs in error. There were some defects in the work, and in the manner of its performance, which operated very extensively on the claims of the defendants in error. Some modifications were made in the agreement of the parties; some extra work

was done, for which claims, opposed by the canal company, were made; and these were rejected.

The instruction, now under consideration, which was excepted to by the plaintiffs in error, was erroneous, because the claim which it sanctions is not in the bill of particulars. The bill of particulars states the claim to be for "detention and damages," in consequence of such detention for want of cement; and the instruction authorizes the defendants in error, to recover before the jury for money laid out and expended, on the count in the declaration; the money having been paid to their hands while waiting for the cement. The company had not agreed to furnish cement. There was no express contract to do so. The supply they were to furnish depended on their obtaining the article; either on the canal, or in New York, or elsewhere. It was a proposition, which, having been accepted, was not binding, unless the means of executing it were procured. This was the state of the arrangements between the parties, before the time limited in the contract expired; and it was *not afterwards renewed. Thus, on the evidence, there was no foundation for the instruction; the proof to [*550 establish it failed. The evidence showed, that there was not a deficiency until after the 30th of December 1829. The deficiency which took place in the spring and summer of 1830, could not be made the subject of a claim. The whole instruction rests on the assumption, that the money was paid at the instance of the company. There was no evidence of such a request, and the court so decided in their previous ruling on the trial. Cited, Angel on Corporations 60, and the cases collected.

By a reference to the charter of the company, under the Virginia law, the power given to the company to act, and the manner in which contracts binding on the company are to be made, will be seen. The agreements which are held to bind the company, in this case, do not conform to those provisions. No contract is to be inferred from the confessions, or the casual conversations of the directors, or any of them. 7 Cow. 462.

The circuit court left it to the jury to infer, that the contract had been rescinded, without a particle of evidence; and they left it also to the jury to infer a new contract, when there was no testimony to sustain it. The claim to recover on the count for money laid out and expended, is against the authorities. Cited, 1 Tidd's Pract. 537; 13 Petersd. 80; 3 Stark. 1055–6; 2 Bos. & Pul. 243. The instruction is upon the effect of evidence, or rather it is positive that certain matters had been proved. This was contrary to the principles of law regulating the trial by jury.

The action of *indebitatus assumpsit* cannot be sustained for such a cause. Selw. N. P. 61. This action will only lie, where debt will lie, and a recovery of this kind cannot be had on such a general count. There should have been a special count, setting out all the circumstances, and alleging the liability of the canal company to furnish the cement by the contract. 6 East 569–70.

Key, for the defendants in error.—The bill of exceptions is sufficiently descriptive of the demand of the plaintiffs in the circuit court. It gave the defendants notice of the nature of the claim. If it was not, they *could have called for a further specification; and this court will not allow an objection to be made here, which was not presented for the [*551

consideration of the court below. As to the effect of the bill of particulars: cited, 1 Holt's Nisi Prius 552; 9 Wheat. 581. Had the objection been made below, the plaintiffs would, under the law of Maryland, of 1785, ch. 8, § 4, have had the privilege of amending, even after the jury were sworn.

As to the objection that the court has undertaken to instruct the jury on matter of fact, it is said, that the court adjudged that the canal company had undertaken to furnish the cement. This is not so; the whole is put hypothetically. This court will not be disposed to construe the action of the circuit court unfavorably. The instruction assumes no facts; the court left the case and the evidence which was given, to the jury.

As to the objection that the action could not be sustained by the evidence offered under the bill of particulars: cited, 1 Selw. N. P. 60; *Moses* v. *Macferlan*, 2 Burr. 1008; *Perkins* v. *Hart*, 11 Wheat. 237. The evidence supported the claim stated in the bill of particulars. If there had been no evidence, it is admitted, the instruction was erroneous; but the depositions of a number of witnesses prove the deficiency of cement, and the wages paid by the contractors while waiting for it. The court is particularly referred to this testimony.

It is contended, that the acts of the president and directors, and the agents of the company, as proved in the depositions, were not binding upon the canal company. These acts were in the course of their duty; and the principles settled by this court in the cases of the *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, support this evidence. The evidence is that of the agents of the company; that they received and communicated the orders of the board of directors to the contractors to keep their hands, and they would pay them. It is said, there should have been a record of the acts of the board upon this matter, and that only such a record would be evidence. This, it is considered, was an objection to the evidence, which cannot be taken here. But the *law does not require this evidence. The testimony was offered to show the contract, and was so received. The counsel in the court below allowed the evidence to be given, and took the chance of its influence; and they now come into this court and make objections to it.

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Webster, also for the defendants in error.—The proceedings in this court are on a writ of error to revise a judgment of the circuit court, in a case in which the plaintiffs below were creditors of the canal company, and sought the recovery of their claim; of which, on the demand of the defendants, they furnished a bill of particulars. It seems, they met in the case all the obstacles usually presented in actions against corporations. There were more than the usual exceptions taken in this cause, even in cases in this district. The record shows this. Many parts of the evidence were excluded by exceptions taken by the defendants; and upon what was left, out of a claim for upwards of five times the amount, a verdict for upwards of $20,000 was obtained.

On the writ of error in this court, nothing can be brought under an examination, but the accuracy of the motion ruled in the court below. The precise inquiry in the case is, does the bill of exceptions present a question for a decision of the court, which could be required of the court, on the counts in the declaration? The law of bills of particulars is settled. If the bill of

particulars refers to the particulars of the matter excepted to, without being sufficiently definite, exception should be taken to it, and a further demand made. In this case, no such demand was made ; and under this general bill of particulars, the party went to trial, and no question was made before the trial, as to its sufficiency. It is said, that when the evidence was given, it was not known how it would be applied ; but this might have been brought to light by asking instructions of the court. The party introducing it cannot say, "I will show you hereafter how the evidence will apply." If the party against whom the evidence is offered admits it, he may ask the court to instruct the jury it does not apply. The bill of particulars shows that the claims of the plaintiffs *below were for wages paid, while waiting for cement ; and that there was a deficiency of cement. This was [*553 enough, unless the defendants had asked for more ; which they could have done. The evidence was within the bill of particulars, and was fully authorized by it.

The ruling complained of is a ruling in matters of law, and not of evidence. It is not a ruling as to the character of the evidence. It was the effect of the ruling of the law, upon a supposed state of evidence. Although it is admitted, that there must be some evidence, yet it was not necessary it should be strong. The question for the jury was the effect of the evidence. The questions presented are : 1st, Was there any evidence on this point ? 2d, Was the ruling right ? The rule against stating speculative cases cannot apply. There must be evidence to raise the question out of which the points are to be presented to the court. If there was any evidence, it was enough to sustain the ruling of the court, that the question should be given to the jury upon it.

Was there such evidence, good or insufficient, to submit the case ? The evidence was various ; and that of one of the witnesses, Mr. Wright, was particularly applicable. The directors, at a meeting in the counting-house of the treasurer of the company, agreed, that the company would pay the contractors for their losses by the want of cement. If this evidence was against an individual, it would be sufficient and competent. If it was objectionable as irregular, as it was against a corporation, it should have been excepted to. It was admitted, without an exception. The admission of it, on the trial, is equivalent to an agreement in writing to allow it to be given. Evidence given on trial, without objection, cannot afterwards be made the subject of an exception. By this evidence, it appears, that the engineers and officers of the company, assured the contractors they should be paid ; and this with the authority of the directors.

The resolution of the board of directors, that they would not pay damages for the failure of the company to deliver cement, was the act of the plaintiffs in error. The contractors did not assent to this determination ; nor were damages claimed by the defendants in error. The claim is for the actual pecuniary expenses paid by them, while waiting for the cement. *But if this resolution could operate, the evidence shows, that it was [*554 afterwards rescinded or disregarded by the officers of the canal company.

The instruction given to the jury was well given, under another view of the case. The instruction involves the question of law, whether the plaintiffs in the circuit court could recover for the wages paid their men

while waiting for cement, under the count in the declaration for money paid, laid out, &c. Whether the evidence authorized such a recovery under this count, has been disregarded in the argument for the plaintiff in error. The defendants had prayed the court to instruct the jury, that no recovery could be had, unless a new contract was proved. This was denied by the plaintiffs. The instruction is thus put hypothetically; and it should be so read by this court, interposing before each statement, "if the jury believe;" and thus it will be manifest, that the court left all the matters to the jury. The bill of particulars in this aspect of the case, had nothing to do with the questions thus left to the jury. The evidence given was before the jury, and they found upon it for the plaintiffs; without any other than the legitimate action of the court upon the facts.

Southard, for the plaintiffs in error.—The plaintiffs in error complain of an instruction given to the jury in the court below. To understand the instruction and test its validity, it is necessary to consider: 1. The nature of the action. 2. The claim made by the plaintiffs below. 3. The specific evidence to which the charge related. 4. The legality of the evidence in this action. 5. The legality of it, in the precise circumstances in which it was offered. These points embrace not only the views presented by the plaintiff in error, but those by which they have been resisted.

1. The action. It is *indebitatus assumpsit*. What may be recovered in this action? Technically and practically, there are two kinds of *assumpsit*, as distinct as other forms of action. 1. A special *assumpsit*, when the plaintiff sets forth the breach of which he complains. In this he has to *555] set out a specific agreement, and the breach *of it; both of which he must prove. This was clearly not done in this case. 2. *Indebitatus assumpsit*. It is in its nature an action of debt; and is substituted for it; because the defendant is not permitted in it, as he may in an action of debt, to wage his law. 4 Co. 91; 3 Wooddes. 168. Its precise character is important; especially, as one of the counsel for the defendants has thrown himself on this point, and suggested, that it had been disregarded in the opening argument. It is, however, without difficulty. The rule laid down is universal; although questioned by Lord Mansfield, in 2 Burr. 1088, the case cited by the defendants in error. It is established, that the form of *indebitatus assumpsit* will lie, in no case in which debt will not lie; although debt will lie, when it will not be sustained. 1 Salk. 23. In this action, the cause of the debt must be stated, but it must be concisely; yet if not stated, it is error, or is reason for arrest of judgment, Cro. Jac. 206–7, because the court must see that there is matter on which the *assumpsit* may be founded. In stating the matter, general forms, called common counts, have been long settled; and it is an inquiry what may be proved under them. It will be lawful to prove any fixed, settled and determinate sum, arising on a precise contract, where the sum is, or may be, reduced to certainty; such as, fees due by custom for tolls; or on a foreign judgment. But you cannot recover in it anything which is not of a definite character. 1 Salk. 23; 1 Ld. Raym. 69. It is common to avoid this difficulty by setting out in a special count, the contract by which the money is claimed; and then, if a failure to prove the contract takes place, the general counts may be resorted to. But the special contract must be set out, if there is to

be a recovery upon it. Among the common counts, "money paid, laid out, &c.," is the most frequent. The law, in such cases, implies a promise of repayment; and there must be such a promise, express or implied. 8 T. R. 310, 610; 1 Ibid. 20. If the promise is express, it must be so stated; as when one pays, to one in his own employ, wages, for the benefit of another, there must be an express contract stated and proved, or there is no consideration. *These are the very elementary principles in this action; and they would not have been repeated, but they have been brought into question by the adversary argument. The proper conclusions from them are: 1. That you cannot recover under a general count, what is founded on a special agreement, without setting out that agreement; and if it be permitted, there is error somewhere in the progress of the cause: 2. That you cannot claim unascertained damages, resulting from the violation of an agreement; if you do thus recover, there is equal error. The suggestion that everything recovered in the action must be damages, was made without precision of thought, or of expression. Damages are nominally, technically, recovered in this action; but this is the description given to the amount of debt which is recovered; and the sum which may be assessed by court or jury, for an injury sustained; an account stated; an agreement to deliver grain at a given price, an ingredient of which is, the benefit to be derived from the possession and sale of it. When, therefore, it is complained, that damages have been recovered in this form of action, it means the latter, not the former kind. If they can, it should be shown how they can be recovered. This is now to be considered. [*556

2. What is the case before the court? What is the claim? The case stated is on all the common counts, but only one comes in question here: that of "money paid by plaintiffs for defendant's use." This is important to the precise understanding of the legal questions raised. What is this count? For money paid. How pretended to have been paid? Not on any legal ability, as surety or otherwise, but upon an express contract. What is the contract pretended? That the defendants had promised to furnish water lime, had failed so to do, and when the plaintiffs were suffering from the same, they promised, if they would not leave the work, would retain their hands, and pay them, they would refund the amount paid. A more special contract cannot be set out—a more specific claim for damages cannot be made. Take it in parts. 1. A promise to furnish water lime, and a failure. Could damages be recovered for these? This need not be argued. 2. If you will keep and pay your hands, we *will save you harmless. The payment of the hands is but a part of the agreement, and the damages follow. Is this varied by the promise to pay? If it is, it must be applicable alike to all other damages; for this was only a part, and the promises related to all. It appears clear, then, that there has been in the case a recovery which is against law; and the inquiry is, can this court now arrest it; or has the cause been so managed below, that the eye of the judge cannot reach it, his ear is closed, and violations of law are to be sanctioned. The answers are to be found in the instruction which is now resisted. [*557

The history of the instruction is essential to the correct understanding of it. The plaintiffs claimed $140,000, on various accounts. They presented a bill of particulars, containing the items which formed this amount. At the trial, they offered proof of them; but they were all overruled; explicitly,

and without a single exception, overruled. This is a strong leading fact in the cause. There was a stage in the trial when the court had laid down the law, excluding every item in the bill of particulars. This fully appears on the record. The decisions of the court upon the claims of the plaintiffs, embrace: 1. The construction of all the locks, and the labor upon them, and the damages for not complying with the agreement, &c. The evidence given on the trial must have applied to one or other of those heads. First, as to the work, and the price of it. The contract prices had been paid. This is expressly shown in the record. Thus, the contract was established, and the prices were fixed; and the accounts had been presented according to it and paid. All, therefore, in the bill of particulars, which relates to all the work contracted for at first, had been settled. The effort of the plaintiffs was, to obtain, not the contract prices which had been stipulated, but a higher price; a *quantum valebat*, or *meruit*; and the court expressly decided, that this could not be. All the extra price, therefore, was out of the case; and this one decision left less than the amount recovered, as will be seen on an examination of the bill of particulars. This clearly shows, that in the further progress of the *case, there was some error which admitted matters to wrong the defendants below. 2. There were changes and modifications in the work, and some of the items were founded on them. For these the plaintiffs sought to recover their value; but the court ruled that they also must be governed by the contract; and that as the engineers were to estimate for them, and to settle controversies respecting them, their decision was to be conclusive, and no erroneous estimate, at a previous time, or by other persons, could alter it. The contract, and the instruction given upon it, will fully establish these positions, and show that all these items were overruled. 3. The plaintiff claimed damages on the subject of injuries sustained on a contract to furnish lime. Whether this contract was found in the original agreement, or in some subsequent one, it was all met by the court. The principle they sustained in the previous instruction was, that in this action, damages for the breach of a special contract could not be claimed and recovered. 4. The plaintiffs were hurried to finish the work by the 4th of July 1830, and they claimed damages in the form of higher wages, thirty-three per cent. advance on these wages. But the answers to this are—1st. The defendants had, by the contract, a right to urge them at any time. 2d. The evidence of this was the sayings of the president, which are clearly inadmissible to bind the company to pay damages. 3d. This was long after the time in which the contract was to be completed; and there was no evidence that the time was extended. This matter was then overruled.

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In these decisions of the court, on the several claims stated, all the claims of the plaintiffs, it is repeated, were overruled by the court in their previous instructions. Not an item in the bill of the plaintiffs can be found, to which one or other of the instructions of the court had not applied. If any exception from this position could be found, it was wages of the men during the detention, as alleged, from the want of cement. But these are manifestly independent of any contract to pay them, and they were damages from breach of contract; as purely so, as any other evil resulting from the neglect of the defendants on this point. *Whether they can be removed from this condition, by what occurred in the subsequent

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part of the case, will be hereafter considered. Whether the court did right or not, in thus excluding the plaintiffs from evidenee, or the effect of evidence in these particulars, is not now the question. The plaintiffs below have recovered, and come here to sustain the judgment; and this they cannot do, by showing the court erred in deciding against them on other points. This is clear and is admitted. Nor is it necessary to discuss the conduct of the circuit court, in admitting these various instructions. The practice is peculiar to that court, and the courts of Maryland. No one can conduct a case in safety under it. Not fact and justice, but skill, must triumph; or the prejudices of the court and jurors prevail. But it is more important to remark, that these instructions are a substitute for the practice which prevails elsewhere, of taking exceptions to the admission of evidence, or claiming the rejection of evidence. And this is an answer to the suggestion, that the defendants should have objected to, and have asked the court to overrule the evidence.

After this long examination, we have reached a position clear of difficulty, and can observe the action of the court in the instruction, which is the subject of examination on this writ of error. We have a claim, by the plaintiffs below, for a debt; the particulars of that debt; a written contract with the defendants by which it was limited; and the overruling of every item in that bill, except such as were proved to have been paid. The result of this state of things to the plaintiffs, was inevitable. To escape from it, the plaintiffs sought an instruction on one specific point. It was in relation to the payment of wages on locks No. 5 and 6. It applied to no other locks. It was wages there, and on these locks only. This is a full answer to all the reference to the evidence in the case. There is no evidence relating to these locks; all the testimony relates to other locks. The language of the instruction must be confined to this point; and the importance of so confining it is apparent. 1. Because damages with regard to all the other locks had been excluded; and all damages for the want of cement. *2. The claim was under a contract to pay the wages on these, and not on [*560 others. 3. If it extended to others, it will produce the result of making the court directly contradict itself; having in eleven previous exceptions laid down other rules. 4. Because it was asked respecting two locks only, and if such a construction be given to it, as applies to others, an immense amount of damages is let in, ten times greater than is asked under this instruction. 5. Wages, as such, had been overruled, as damages; these are to be brought in, because there was a special contract.

If the instruction be liable to such an interpretation, it was error. The jury were not guided by it, but they were misled. On a particular examination of the instruction, it will be found to have two parts, as to time; from the 2d of September 1829, to the 30th of January 1830: and after the 30th of January, the jury are told, that if they believe, 1st. That between the 2d of September 1829, and the 20th of January 1830, the defendants had contracted to deliver water lime; 2d. That the plaintiffs expected it; 3d. That hands were kept idle, and were paid by the plaintiffs; 4th. That the defendants requested this, and promised to pay for the same: the plaintiffs might recover the sums so paid, under the count in the declaration for money laid out and expended. This is not for damages, for that had been overruled; but upon a special contract, and that contract was not stated.

The cases referred to in a previous part of the argument, have, therefore, full application to this ruling of the court. The second part of the instruction proves that this was the view of the court. They regard the contract as evidenced by the order of the 2d of September 1829, and rescinded by that of the 30th of January 1830.

The instruction then was, that there was a contract, and wages paid on account of it, between the 2d of September 1829, and the 30th of January following. Let us examine, if this was correct, in point of law. There was no notice of such a claim. What notice was given? The bill of particulars. It states detention and damages, for want of cement on locks 5 and 6, $600. The case cited shows, and it is admitted, that the bill of particulars, in such actions, must refer to the matters claimed, clearly and *distinctly. Here, a contract for the payment of wages is embraced under the words "detention" and "damages." Do they embrace it? There is no reference to the contract, in the notice, no information of the ground of claim. Could the defendants suppose, that under it a specific contract was to be proved? They knew that detention and damages could not be proved. There is a most marked distinction between them. Cited, 2 Bos. & Pul. 243; Tidd's Pract. 537; Stark. Evid. 1056; 4 Taunt. 189. The claim presented to the jury in the instruction is not detention and damages, but a debt upon a specific contract; and the contract is not referred to nor stated in the bill of particulars.

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But it is objected, that although this be true, the plaintiffs in error are now too late. We are bound to notice, before trial, a defect in the bill of particulars, in stating matters not legally claimed, under such an action as this was. But it is denied that this is the law. When the parties came to the trial, they objected to the evidence. This was done expressly, when the claim assumed the form of damages, as it did when the eleventh instruction was given. A party may either object to the omission of the notice, or move to overrule the evidence, and to exclude it. The latter was done. It was, therefore, objected to, so far as it was in the power of the party to do it.

Another objection to the instruction is, that it adjudges matters of fact. Upon this the counsel of the defendants in error differ with those who maintain this position. The court will decide the question. But there is another objection to the instruction. It submits what was not at all in evidence in the case. In support of this position, the counsel for the plaintiffs in error went into a particular examination of the evidence in the record.

These reasonings on the instruction are submitted as fatal to it; and the evil which the plaintiffs in error sustained from it has been serious. While the damages claimed by the defendants, in the court below, were overruled, yet by this instruction, the whole question as to damages was left open to the jury, and a verdict was given in their favor, for upwards of $20,000. In the circuit court, if the claims of the defendants in error are just, they will have no difficulties *in another trial: and, if the law requires it, they may amend the declaration and the notice.

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It is not denied, that a contract may be inferred from the acts of a corporation. It is the better opinion, in modern times, that it can be done; but in this case there was no evidence of any acts of the corporation, but

solely of some of the officers employed by it. There was no entry on the books of the corporation; no meeting of the directors, or vote by the board. It was the act of the president only, on which the plaintiffs below rested their claims; and of the engineers, on the authority of the president. This was not sufficient. The court must adjudge whether there was sufficient evidence to make the corporation liable. 1 Pet. 363; 12 Wheat. 74, were cited by the counsel of the defendants in error; and they sustain the rule now contended for.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court, by writ of error to the circuit court for the district of Columbia. The defendants here, who were plaintiffs in the circuit court, commenced an action of *assumpsit*, to recover a large sum alleged to be due, for the construction of certain locks, &c., for the Chesapeake and Ohio Canal Company; and filed their declaration, containing nine general counts of *indebitatus assumpsit*, for work done and materials found, money laid out and expended, on account stated, &c.; and the defendants pleaded the general issue. On the trial, several exceptions were taken to the ruling of the court, by the plaintiffs; and one exception was taken by the defendants, which presents the points for the decision on the present writ of error.

The following is the instruction referred to: "In the further trial of this cause, and after the evidence and instructions stated in the preceding bills of exceptions had been given, and after evidence offered by the plaintiffs, of the payment of money to the laborers for the time during the detention, occasioned by the want of cement on locks 5 and 6, the plaintiffs, by their counsel, prayed the court to instruct the jury, that if the jury believe, from the said evidence, that the defendants had, on the 2d of September 1829, and from that time till the 20th day of January 1830, contracted with the plaintiffs to furnish *them with cement necessary, &c., in due time, &c.,,and that the plaintiffs, expecting that sufficient supplies [*563 of cement to go on with the work would be furnished by the defendants, as defendants had so engaged to do, hired a large number of hands, and brought them to the locks; and when the defendants had so failed to furnish the cement, kept the same hands idle, waiting for cement, on the defendants' desire that they should do so, in order to be ready to go on with the work; and paid them their wages, while so waiting; then the plaintiffs are entitled, under the count for money laid out and expended, contained in the declaration, to recover the money so paid to said hands, during such periods. But that the plaintiffs are not entitled to recover for wages paid to their workmen, on account of a deficiency of cement, after the said 20th day of January 1830, unless the jury shall be satisfied by the said evidence, that the said resolution of the board of directors of the 20th of January 1830, was rescinded by the said board, and a new contract entered into thereafter, by the defendants, to furnish cement to the plaintiffs, and the subsequent failure on their part so to furnish it, and an agreement also to pay for the wages of the plaintiffs' workmen, while so waiting," &c.

The resolution referred to in the bill of exceptions, is in the words following: "Resolution of the Board of Directors of the canal company, in meeting, January 20th, 1830. Resolved, that although this board has stipulated to supply the contractors with water lime, yet the board will not

be held responsible for any damages arising from the want of that article." A bill of particulars was filed by the plaintiffs under the order of the court; and in which bill, the following item is charged: "Detention and damage sustained, for want of cement, in locks No. 5 and 6, $600."

This case has been ably argued on both sides, and the questions involved in it are of much practical importance. The counsel for the plaintiffs in error object to the bill of particulars, and insist that the above item for damage for want of cement, &c., is not sufficiently specific, as it does not apprise the defendants of all the facts on which the charge for damage is made. It does not state how the damage was sustained by the plaintiffs, and on what ground an indemnity *was claimed of the defendants. *564] A bill of particulars, it is contended, when demanded, becomes a part of the declaration; and with the exception of certain averments, it should contain equal certainty. There can be no doubt, that a bill of particulars should be so specific, as to inform the defendant, substantially, on what the plaintiff's action is founded. This is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant, rather than to enlighten him. As the bill of particulars is filed before the trial, it is always in the power of the defendant, to object to its want of precision, and the court will require it to be amended, before the commencement of the trial. And if this be not the only mode of taking advantage of any defect in the bill, in practice, it is certainly the most convenient for the parties.

In 4 Taunt. 188, the court of common pleas say, substantially, "if a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction." In that case, the plaintiff declared for goods sold and delivered, and for money paid; and delivered to the defendant a bill of particulars, viz: "To seventeen firkins of butter, fifty-five pounds six shillings"—not saying for goods sold. The court decided, that the action should be sustained on the count for money paid. And they remark, as to the objection taken respecting the bill of particulars, bills of "particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant, that the plaintiff's claim arises on account of the butter." And we think, in the present case, that although the bill of particulars does not specify technically and fully the grounds on which the plaintiffs claim damages; yet, in the language of the above case, it sufficiently expresses to the defendants, that the claim arises for want of cement in locks No. 5 and 6.

But the ground on which some reliance seems to be placed for the reversal of this judgment, and which, in the view of the court, is one of the principal points presented by the record, is, that the jury were instructed to find for the plaintiffs below, on *proof of a special contract, and *565] under a declaration containing only general counts. By the instruction of the court, if the jury found, from the evidence, that the contract had been made by the defendants, as stated, and that the money had been paid to the hands detained for want of cement, the plaintiffs were entitled to a verdict on the count for money laid out and expended. In the argument, it was contended, that there was no legal proof of the special contract. That a corporation can only contract within the terms of its charter, and

that there does not appear to have been any action of the board, sanctioning the contract as insisted on by the plaintiffs.

The ancient doctrine, that a corporation can act in matters of contract only under its seal, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it, and subject it to an action of *assumpsit*. But it is unnecessary to examine either the ancient or modern doctrine on this subject; for as no exception was taken to the evidence which conduced to prove a special contract in the court below, the objection cannot be raised in this court.

There can be no doubt, that where the special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it. The case of *Towers* v. *Barrett*, 1 T. R. 133, illustrates very clearly and fully this doctrine. In that case, the plaintiff recovered, on a count for money had and received, ten guineas paid to the defendant for a one-horse chaise and harness, which were to be returned, on condition the plaintiff's wife should not approve of the purchase, paying three shillings and six-pence *per diem* for the hire, should they be returned; and as the plaintiff's wife did not approve of the purchase, they were returned and the hire was tendered at the same time. "But if the contract remain open, the plaintiff's demand for damages arises out of it, and then he must state the special contract, and the breach of it." It is a well-settled principle, where a special contract has been performed, that a plaintiff may recover on the general *counts. This principle is laid down by this court, in the case of the *Bank of Columbia* v. *Patterson's Administrators*, [*566 7 Cranch 299. In that case, the court say, "we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been executed; and that it is not, in such case, necessary to declare upon the special agreement."

It would be difficult to find a case more analogous in principle to the one under consideration, than the above. The same questions, as to the right of the plaintiff to recover on the general counts, where the special agreement was performed; and, also, as to the powers of a corporation to bind itself, through the instrumentality of agents; were raised and decided in that case, as are made in this one. And it would seem, where this court had decided the point in controversy, and which decision had never afterwards been controverted, that the question is not open for argument. But whether this doctrine be considered as established by the adjudications of this court, or the sanction of other courts, it is equally clear, that no principle involved in the action of *assumpsit*, can be maintained by a greater force of authority.

In 1 Bac. Abr. 380, it is laid down, that "wherever the consideration on the part of the plaintiff is executed, and the thing to be done on the defendant's part, is mere payment of a sum of money, due immediately; or where money is paid on a contract which is rescinded, so that the defendant has no right to retain it; this constitutes a debt for which the plaintiff may declare in the general count, on an *indebitatus assumpsit*. Anciently, the count in such cases was special, stating the consideration as executory, the promise, the plaintiff's performance, and the defendant's breach; but the *indebitatus*

has grown, by degrees, into use." "So also, if goods are sold and actually delivered to the defendant, the price, if due in money, may be recovered on this count; and this though the price is settled by third parties." 1 Bos. & Pul. 397; 12 East 1. "Where the plaintiff let to the defendant land, rent free, on condition that the plaintiff should have a moiety of the crops; and while the crop of the second year was on the ground, it was appraised for both *parties, and taken by defendant; it was held, that the plaintiff *567] might recover his moiety of the value in *indebitatus assumpsit*, for crops, &c., sold; for by the appraisement, the special agreement was executed, and a price fixed at which the defendant bought the plaintiff's moiety." The same principle is found in *Helps and another* v. *Winterbottom*, 2 B. & Ad. 431; *Brooke* v. *White*, 4 Bos. & Pul. 330; *Robson* v. *Godfrey*, Holt 236; *Heron* v. *Granger*, 5 Esp. 269; *Ingram* v. *Shirley*, 1 Stark. 185; *Forsyth* v. *Jervis*, Ibid. 437; *Harrison* v. *Allen*, 9 Moore 28; *Bayley* v. *Gouldsmith*, Peake 56; *Gendall* v. *Pontigny*, 1 Stark. 198; *Farrar* v. *Nightingale*, 2 Esp. 639; *Riggs* v. *Lindsay*, 7 Cranch 500; *James* v. *Cotton*, 7 Bing. 266; *Foster's Administrator* v. *Foster*, 2 Binn. 4; *Sykes* v. *Summerel*, 2 Browne (Pa.) 227. As, by the instruction of the court, the jury must have found the contract executed by the plaintiffs below, before they rendered a verdict in their favor, we think, the question has been settled by the adjudged cases above cited; and that on this point there is no error in the instruction of the court.

But it is insisted, that, in their instruction, the court lay down certain facts, as proved, which should have been left to the jury. If this objection shall be sustained, by giving a fair construction to the language of the court, the judgment must be reversed; for the facts should be left with the jury, whose peculiar province it is to weigh the evidence, and say what effect it shall have. The instruction states, "that if the jury believe from the said evidence, that the defendants had, on, &c., contracted with the plaintiffs, expecting that sufficient supplies of cement to go on with the work, would be furnished by the defendants, *as defendants had so engaged to do*, hired a large number of hands and brought them to the locks, and, *when the defendants had so failed to furnish the cement*, kept the said hands," &c. The words italicised are those objected to, as assuming the facts stated to be proved, and consequently superseding an inquiry into those facts by the jury. It must be observed, that in the first part of the instruction, the jury were told, "that if they believe from the said evidence, that the defendants had contracted with the plaintiffs to furnish *them with cement neces- *568] sary, &c., in due time, &c., and the plaintiffs expecting that the cement would be furnished, *as defendants had so engaged to do*, &c., making the words italicised to depend upon proof of the contract, viz., the furnishing of the cement in due time, as stated in the bill of exceptions; it would, therefore, seem to be clear, that these words could not have withdrawn from the jury any fact, as they were made to depend on the establishment of the contract by the finding of the jury. And the same remark applies to the other words objected to; that is, when "the defendants had so failed to furnish the cement;" for these words could have had no influence with the jury, unless the evidence, by their finding, not only established the contract to deliver the cement, but also showed a failure by the defendants to deliver it. It therefore appears, that the words objected to in the instruction, when

viewed in connection with its scope and the language used, did not assume facts by which the jury could have been misled ; but stated them as resulting from the finding of the jury, that the contract had been made and broken by the defendants, as hypothetically stated in the instruction.

It is objected, that there was no evidence in the case, conducing to prove the facts on which the above instruction was founded. The court ought not to instruct, and indeed, cannot instruct on the sufficiency of evidence ; but no instruction should be given, except upon evidence in the case. Where there is evidence on the point, the court may be called on to instruct the jury as to the law, but it is for them to determine on the effect of the evidence. In the present case, there was evidence, which was not objected to, conducing to prove the contract, hypothetically stated in the instruction ; and in such case, whatever ground there might have been for a new trial, there is none for the reversal of the judgment.

The instruction was limited to the damages sustained by the plaintiffs, for a failure to deliver cement by the defendants, for the construction of locks numbered five and six ; and as the bill of particulars charges the damages thus sustained at $600 only, and the damages assessed by the jury amount to the sum of $20,707.56, it is contended by the *counsel for the plaintiffs in error, that on these facts, the judgment should be reversed. In the course of the trial, twelve bills of exception were taken by the plaintiffs to the rulings of the court on the various points raised ; but these exceptions are not now before the court for decision. It is insisted, however, that although the questions of law raised by these exceptions are not before the court ; yet the facts, in regard to the evidence which is shown by the exceptions, are before them, and should be considered in reference to the point now under examination. In the eleventh bill of exceptions, after certain prayers by the plaintiffs' counsel, which were refused by the court, the defendants, by their counsel, "prayed the court to instruct the jury, that the plaintiffs are not entitled to recover damages under either of the counts in the declaration in this cause, by reason of any failure on the part of the defendants to deliver cement to the plaintiffs for the prosecution of their work on the locks contracted to be built by them ; which the court gave as prayed." And in the twelfth exception, they gave a similar instruction, on the prayer of the defendants. From these exceptions, and others taken by the plaintiffs below, and the bill of particulars, it is contended, that it sufficiently appears, there was no evidence before the jury, under the instructions of the court, except that which conduced to show the amount of damages sustained by the plaintiffs, for the want of cement in the construction of locks five and six. If it were proper to look into the exceptions of the plaintiffs below to ascertain this fact, there would still be no difficulty in overruling the objection ; for the instruction given on the prayer of the plaintiffs below, and excepted to by the defendants, and which is the error complained of, may be reconciled with the other exceptions, on the ground that additional evidence was heard by the jury, before the instruction was given. [*569

But if this were not the case, it would afford no ground for the reversal of the judgment of the circuit court. Whether the court erred or not in refusing to give the various instructions prayed for by the plaintiffs below, is not now a subject of inquiry. It may be admitted, that they did err, so

that if the verdict had not been satisfactory to the *plaintiffs, they might have reversed the judgment on a writ of error ; yet the evidence on which those instructions were refused, remained in the cause, for the action of the jury. And as additional evidence was given, as appears by the exception of the defendants below; the cause was submitted to the jury upon the whole evidence.

Whether the jury assessed the damages on account of the injury sustained by the plaintiffs, for the want of cement in the construction of locks, other than those numbered five and six, or on account of other items stated in the bill of particulars ; it is impossible for this court to determine. If the jury failed to observe the instructions of the court, or found excessive damages, the only remedy for the defendants was by a motion for a new trial. As the case now stands, we are limited to the legal questions which arise from the instruction given on the prayer of the plaintiffs, which was excepted to by the defendants, and on which this writ of error has been brought. And as it appears from the views already presented, that the circuit court, in giving this instruction, did not err, the judgment below must be affirmed, with costs.

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, with costs and damages, at the rate of six per centum per annum.

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*571] *The Life and Fire Insurance Company of New York *v.* Christopher Adams

Mandamus.

Although no rule to show cause why a *mandamus* should not issue to the district judge of Louisiana had been granted by the court, the district judge had agreed to appear, as if a rule had been granted by this court, and had been served upon him ; and copies of the papers on which the motion for a *mandamus* was founded, had been served by the district judge and on the parties in the suit in which the *mandamus* was to operate, during the vacation ; the district judge filed an answer, as if the rule had been served on him, and appeared by counsel, waived the formal rule on notice, and stated his readiness to show cause. Under such circumstances, there is no necessity for directing a rule to be entered and notice to be given ; all the purposes of the rule are accomplished.

This was a motion for a *Mandamus*, to be directed to the District Judge of the district of Louisiana. There had not been any rule taken out and served on the district judge, to show cause why a *mandamus* should not issue. Copies of the papers on which the motion was founded, with notice that the same would be made at this term, had been served on the district judge and the parties in the suit pending before him, during the late vacation. The district judge appeared by counsel, and waived any notice of a rule to show cause, and offered to show cause *instanter*. An objection having been suggested, whether, even by consent on both sides, the rule and service thereof ought to be dispensed with, some discussion took place on the subject between the bench and the bar.