"Philadelphia, October 5, 1796.

At sixty days, I promise to pay to the order *of Mr. Archibald, Gardner, three hundred and thirty-six dollars and ninety-seven cents value received. A. LINDO."

Peacock, for the plaintiff in error, was about to produce authorities on the first point, when he was stopped by CHASE, J., who said, that an action of debt will not lie, in Maryland, upon a promissory note.[1]

No opposition being made on the part of the defendant in error, judgment was afterwards reversed, without argument.(*a*)

HODGSON *v.* DEXTER.

Responsibility of public officer.

A public agent of the government, contracting for the use of government, is not personally liable, although the contract be under his seal.[1]

Quære? What shall be said to be the act of God; and what, inevitable casualty?

Hodgson *v.* Dexter, 1 Cr. C. C. 109, affirmed.

THIS was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late secretary at war, for not keeping in good repair, and for not delivering up, in like good repair, at the end of the term, certain premises which had been leased by the plaintiff to the defendant, for the purpose of offices for the war department; the buildings having been destroyed by fire, during the term. The lease was in these words:

"This indenture, made the 14th day of August, in the year of our Lord one thousand eight hundred, between Joseph Hodgson, of the city of Washington, and territory of Columbia, of the one part, and Samuel Dexter, of the same place, secretary of war, of the other part, witnesseth, that the said Joseph Hodgson, for and in consideration of the sum of four hundred dollars, current money of the United States, to him in hand paid by the said Samuel Dexter, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath demised, granted and to farm let, and by these presents, doth demise, grant and to farm let, to the said Samuel Dexter, and his successors, all that the three story messuage or
*346] tenement, erected and built *on part of lot number 14, in square number 75, situate on the Pennsylvania Avenue, in the city of Wash-

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(*a*) See note (B) in the Appendix, p. 462.

[1] The action of debt lies, whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty, requiring no future valuation to settle its amount. Stockwell *v.* United States, 13 Wall. 531; Chaffee *v.* United States, 18 Id. 516; United States *v.* Foster, 2 Biss. 453; United States *v.* Ebner, Id. 117. It lies by the payee or indorsee of a bill, against the acceptor. Raborg *v.* Peyton, 2 Wheat. 385; Kirkman *v.* Hamilton, 6 Pet. 20. And by a remote indorsee against the drawer, on striking out the intermediate indorsements. Home *v.* Semple, 3 McLean 150. Also by the indorsee of a promissory note against the maker. Camp *v.* Bank of Owego, 10 Watts 130; Willmarth *v.* Crawford, 10 Wend. 341. Or by the indorsee against a remote indorser. Loose *v.* Loose, 36 Penn. St. 538; Onondaga County Bank *v.* Bates, 3 Hill 53. Whenever *indebitatus assumpsit* can be maintained, the action of debt lies; and *indebitatus assumpsit* will, undoubtedly, lie in the cases above stated. Ibid.

[2] Parks *v.* Ross, 11 How. 362; Cook *v.* Irvine, 5 S. & R. 492; Olney *v.* Wickes, 18 Johns. 122.

ington aforesaid, together with the back ground and improvements; running from the said messuage (fronting 26 feet) in parallel lines down to lot number 12, on said square, being the premises next adjoining the messuage or tenement now in the occupation of Mr. Jonathan Jackson, with the improvements and appurtenances thereto belonging or appertaining: to have and to hold the said demised premises unto him, the said Samuel Dexter, and his successors, from the day of the date hereof, for and during, and unto the full end and term of eight calendar months from thence next ensuing, and fully to be complete and ended. And the said Joseph Hodgson for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said Samuel Dexter, and his successors, that he, the said Samuel Dexter, and his successors, shall and may peaceably and quietly have, hold, use, occupy, possess and enjoy the above-demised premises for and during the term granted thereof, without the let, suit, trouble, molestation or eviction of him the said Joseph Hodgson, or his heirs or assigns, or of any other person or persons whatsoever, lawfully claiming, or to claim by, from, under, or in trust for him or them. And the said Samuel Dexter for himself, and his successors, doth hereby covenant, promise and agree to and with the said Joseph Hodgson, his heirs and assigns, that he the said Samuel Dexter, and his successors, shall and will, at all times during the said term, keep, or cause to be kept, in good and sufficient repair, the said demised premises, inevitable casualties and ordinary decay excepted; and the same, so well and sufficiently kept in repair, shall and will, at the end of the said term, yield and surrender up to him the said Joseph Hodgson, his heirs and assigns. In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the day and year first above written. SAMUEL DEXTER, [Seal.]
JOSEPH HODGSON." [Seal.]

"Signed, sealed and delivered in the presence of
JOHN GOULDING,
S. LEWIS, jun."

*The declaration contained two counts. The first alleged the breach thus: "but hath broken the same in this, to wit, that during [*347 the said term of eight calendar months, he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted; and that he hath not, at the end of the said term, yielded and surrendered up to the plaintiff the same, so well and sufficiently kept in repair." The second count alleged that the defendant hath not observed and kept his covenant aforesaid, in this, to wit, "that he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted, but that the same, by an evitable casualty, to wit, by fire, were destroyed, consumed and burnt, during the said term of eight calendar months, to wit, on or about the eighth day of November 1800, and that the said fire, and evitable casualty, was occasioned and took place from negligence, and from the act or acts of one or more evil disposed persons." "And after the said fire, and after the expiration of the said term, the said defendant did not so yield and surrender up the said premises according to the tenor and effect of his said covenant." To the plaintiff's damage $10,000.

The defendant, after *oyer*, pleaded in bar, 1st. "That before the expiration of the said term of eight calendar months in the said writing mentioned, viz., on the 8th of November 1800, the said demised premises, against the will, and without the negligence, or other default of him the said Dexter, were burned and consumed by fire, happening from some cause to the said Dexter then and yet wholly unknown. And the said Dexter further saith, that saving and excepting only the damage occasioned by the same burning and consuming, he the said Dexter hath, at all times, during the said term of eight calendar months, kept and caused to be kept in good and sufficient repair the said demised premises; and that he hath, at the end of the said term, yielded and surrendered up to the plaintiff the said demised premises, so well and sufficiently kept in repair, saving and excepting only the damage occasioned by the burning and consuming aforesaid; and this the said Dex-
*348] ter is ready to verify," &c. *To this plea, there was a general demurrer, and joinder. To the second, third and fifth pleas, there were issues in fact.

The fourth plea was as follows: "That on the 15th of May 1800, the President of the United States, for the time then being, in pursuance of authority given to him by law, did order and direct the various offices belonging to the several executive departments of the United States, of which the department of war then was, and yet is, one, to be removed to the city of Washington, on the first day of June then next ensuing; and that in obedience to the same order and direction, the various offices of the department of war aforesaid were removed to the said city of Washington, on the said first day of June, and that thereby it became proper and necessary, that a suitable building should be hired, in which the said offices of the said department of war might be holden and kept, and for this purpose, and for no other purpose whatever, the building mentioned in the indenture aforesaid was, by the said indenture, leased to the said Dexter; and that, at the time of executing the writing aforesaid, he was secretary of the department of war, and in that capacity, did make and execute the same, and that, before the expiration of the said term of eight calendar months, viz., on the 1st day of January 1801, he, the said Dexter, at Washington aforesaid, resigned the office of secretary of the department of war, and from and after that time, ceased to hold the same office, and until this time, he hath never holden the same; and further, that on the 5th day of March, in the year last mentioned, Henry Dearborn, Esq., was there duly appointed and commissioned as secretary of the department of war, and then and there accepted of the same office, and hath ever since held the same; and he, the said Dearborn, now is, and ever since his acceptance of the said office of secretary of war as aforesaid, hath been, the lawful successor of him, the said Dexter, in the said office; and this the said Dexter is ready to verify," &c.

To which plea, the plaintiff replied, "protesting that the said Dexter did not, in his capacity of secretary of war, sign, seal, execute and deliver the indenture of lease aforesaid exhibited, yet, by way of replication, he
*349] *saith, that although the said Dexter ceased to be secretary of war, on the 1st day of January 1801, and that on the 5th day of March, in the same year, a certain Henry Dearborn became his successor, duly appointed secretary of the department of war, and still remains such, yet that the house and premises in the lease aforesaid mentioned, were burnt down

and consumed by fire arising from within the same, from the negligence or default, not of the said Dexter, but of some person unknown, during the term aforesaid, viz., on the 8th of November 1800, while the said Dexter was secretary of war, and whilst he had possession of the said premises, and before the appointment of the said Dearborn; and that neither the said Dexter, nor any other person, hath, during the continuance of the said lease, or at any time, built up and repaired the said premises; and this the said Hodgson is ready to verify," &c. To this replication, there was a general demurrer and joinder.

The sixth plea was, "that on the 15th day of May 1800, the President of the United States, for the time then being, in pursuance of authority given to him by law," ordered the executive offices to be removed to Washington, &c., as stated in the fourth plea, "and that it became proper and necessary that a suitable building should be hired, in which the several offices of the department of war aforesaid might be holden and kept, and that for these purposes, and for no other purpose whatever," the buildings, &c., "were, by the said indenture, leased to the said Dexter, by the said Hodgson; and that at the time when the said Dexter executed the indenture aforesaid, he was secretary of the said department of war; and this he is ready to verify," &c. To this, there was a general demurrer, and joinder.

Upon these demurrers, the judgment below was against the plaintiff, who thereupon, sued out the present writ of error.

Martin, attorney-general of Maryland, and *Key*, for plaintiff in error. *Dexter, and *Mason*, attorney of the United States for the district of Columbia, for defendant. [*350

Key made three points. 1st. That the defendant is individually and personally liable and bound to the performance of the covenant in the indenture contained, by him executed, and on which the suit is brought. 2d. That the defendant's first plea is bad in law, is argumentative, and does not put in issue matters competent to bar the plaintiff's action. 3d. That the defendant's first plea is bad in substance, is no bar, and wants form.

I. The sixth plea and demurrer are calculated to bring into view the question, whether the defendant has bound himself personally to the performance of the covenant. Although a public agent is not generally liable for contracts made by him in that capacity: still, he is capable of binding himself as well as his government, by using apt words for that purpose. This case is not of importance from any general principles which it will establish. The decision must depend upon the expressions and operation of the indenture of lease.

The defendant has used strong obligatory expressions, of plain unequivocal import. "And the said Samuel Dexter, for himself and his successors, doth hereby covenant, promise and agree to and with the said Joseph Hodgson, his heirs and assigns." To weaken the force of these expressions, it is said, that he only intended to bind himself in his official character, as secretary at war, 1st. Because he is styled in the premises secretary at war; 2d. Because the term "successors" is used throughout the instrument; 3d. Because the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals," refer to Samuel Dexter, in the official character in which he is first named in the premises.

*1st. As to the styling him secretary at war, in the premises, it is only a description of the person, *designatio personæ*. It is the office of the premises to identify the contracting parties, and it is most common, to use any honorable title which they may enjoy. It is not in the preamble, that we are to look for the force of the expressions of the covenant, but in the covenant itself. It is a rule of construction, that when obligatory words, of plain unequivocal meaning, are used, you cannot resort to other parts of the instrument to contradict them; but when equivocal or doubtful words are used, you may. A party using expressions that legally bind him, is estopped to say, he did not intend to be bound in his individual capacity. The word "himself," is to be taken separately from the words "his successors," and each is to be applied to the obligatory words of the covenant; *reddenda singula singulis*. The said Samuel Dexter covenants, for himself, and for his successors. He covenants that he will surrender the premises in good repair; and if he does not so surrender them, he covenants that they, his successors, will. Words cannot be stronger than those which he has used.

2d. As to the word "successors," Mr. Dexter can have no successors in the legal sense of the word. It is true, that Mr. Dearborn filled the office posterior to Mr. Dexter, and hence, in point of time, succeeded him, and was, in that sense, his successor; but he is not his successor in any known legal sense of the word: there is no legal connection between them. Mr. Dexter was not competent to bind his successor in any manner. He was not a corporation sole; and there is no law of the United States which authorizes him to bind his successor. The word "successors," has no operation whatever. Mr. Dearborn was not obliged to occupy the house, nor would an action have been maintainable against him for the rent. If he had been disturbed in the possession, he could have had no action upon the covenant; if he had been ousted, he could not have supported an ejectment. Even if Mr. Dexter had been a corporation sole, his successors would not be bound. No chattel can be limited to the successors of a corporation sole; but it will go
*352] to the executor, and not to the successor. *If these observations are correct, then the word "successors," is surplusage, and the lease inured to Mr. Dexter in his individual capacity; but this point will be resumed.

3d. As to the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals;" they can have no operation to let in Mr. Dexter's official character. Either he bound himself in his official capacity, or as an individual. Nothing can be inferred from the word "said," but that it related to him in one capacity or the other; and in which, is the very question before the court.

Let us now examine this instrument upon principle. 1st. With reference to the person executing it: 2d. As to the legal operation of its expressions.

All agents, acting as such, for avowed principals, only bind their principals; but it must be admitted, that they are competent to bind themselves, as well as their principals, if they use apt and adequate words. Government cannot carry on its operations but through agents, who are distinguished as its officers. I admit, that an officer of government, contracting as such, for government, is not personally liable. The law neither creates nor implies any liability on the officer; but he may make himself individually liable, by his express promise and contract. *Macbeath* v. *Haldimand*, 1 T. R. 181.

There is nothing, then, in the character of secretary of war, that prevents him from using words that will render him liable.

This leads to the second question, which is, whether he has used such words. This lease is for eight months; but if for eight years, the same law must govern its construction. I hold it an undeniable position, that Mr. Dexter was not competent to bind his successors in office. If he could not, then the lease must have some operation: it cannot be intended to be a void lease. If not void, then it inures to Mr. Dexter and his executors: if it inures to them, they *only are liable on the covenant, that is, he in his lifetime, and they after him. A much stronger case exists in the books. A bishop is a corporation sole; he has successors, technically speaking. Here, then, is a person who has a double capacity, competent to contract in either. So had Mr. Dexter. But, say the books, if a lease be made to a bishop and his successors, it inures to him and his executors. 1 Bac. Abr. 508, Corporation, E. 4; Co. Litt. 46 *b; Corven's Case*, 12 Co. 105. The word "bishop" in such a case is as much the description of his politic capacity, as the word secretary at war in the present case. A bishop has legal "successors;" and is not an *habendum* "to a bishop and his successors," as strong as the words "to the said Samuel Dexter and his successors?" If, in the case of the bishop, such a lease would inure to him in his individual capacity, *à fortiori*, in the case of Mr. Dexter, who has no legal successors. [*353

Again, the covenant to leave the demised premises in good repair, is a covenant real. 1 Bac. Abr. 534, 536. If it be a covenant real, and runs with the estate and interest, then, as the estate and interest passes to Mr. Dexter and his executors, he and they only can be bound. Suppose, the lease had been for five years, and a stranger had taken possession; who could support an ejectment? Not the lessor, because he had parted with his interest: not the successor of Mr. Dexter, because he is neither a party nor a privy. Mr. Dexter only could have maintained the action, the estate and interest being in him. It never was out of him, during the term. If the operation of law casts this lease upon Mr. Dexter, he who has the benefit must bear the burden; and he must be bound by this covenant to repair, which runs with the estate.

The defendant's ideas violate all the rules of construction. 1st. In a deed, when words of a precise import are used, you cannot resort to other expressions, for a supposed intent. The word "himself," in the covenant, is too plain to admit of doubt. 2d. No words shall be rejected, which can be made to operate. By their construction, the word "himself," *which has a definite meaning, must be rejected, and give way to the word "successors," which, in this instrument, can have no meaning. 3d. Such construction shall be given, *ut res magis valeat quam pereat.* [*354

According to our construction, the deed is operative; but according to theirs, it is mere waste paper. 1st. They say that Mr. Dexter is not bound. 2d. All must agree that his successor is not bound. 3d. *Ex consequenti*, nobody is bound.

The case of *Unwin* v. *Wolsely*, 1 T. R. 674, is clearly in our favor. In that case, the contract was by an officer of government who expressly contracted "on account of his majesty," and covenanted "on account of the king," that "government should be answerable." In our case, there are no

such words, nor anything except the styling himself secretary at war, and using the term successors, which can possibly indicate any intention to bind the government.

II. The first plea in bar is bad. The matter is insufficient to bar the plaintiff from his action. The substance of it is, that the house was burnt, without the negligence or other default of the defendant. This is no answer to an express covenant. Due care and diligence is nothing more than every bailee for hire, where there is no express agreement, is bound to use. The plea puts in issue the negligence or default of the defendant, and throws the *onus probandi* on the plaintiff to show actual negligence; whereas, the defendant ought to show such an inevitable casualty as to bring himself within the benefit of the exception. He states, that the fire happened without his default, from some cause to him unknown; but it does not thence follow, that the destruction of the house was inevitable. It is immaterial, whether it happened with his knowledge and will, or without. The plea does not
*355] *bring in issue the fact whether the destruction was inevitable, or not; but only whether it happened with his knowledge and by his default. Default or negligence means the want of ordinary care.

III. The merits of this plea have already been discussed in speaking of the word "successors," in the lease. The demurrer here is not by the plaintiff to the defendant's plea; but by the defendant to the plaintiff's replication; but if the replication is bad, yet, if the plea is bad, judgment must be for the plaintiff, unless the court should be of opinion, that the declaration also is bad, inasmuch as it is not supported by the indenture of which a *profert* is made, whereby it becomes part of the declaration. In that case, the fate of this demurrer must depend upon the question of personal liability of the defendant.

Dexter, contrà.—1st. It is admitted by Mr. Key, that the defendant had a right to make a public contract, and thereby to bind the government; and we admit, that he was also competent to bind himself. The question then is, whether this is a public contract; or whether the defendant has bound himself personally. In addition to the internal evidence of the deed itself, the plea states other material facts, which are admitted by the demurrer, and which tend to prove the intention and understanding of the parties at the time of contracting. These facts are, 1st. The order of the president, pursuant to law, to remove the offices to Washington; 2d. Their consequent removal; 3d. The necessity of providing a house in which they might be held; 4th. That for these purposes, and for no other purpose whatever, the buildings were, by the plaintiff, leased to the defendant; 5th. That the defendant was at that time secretary of the department of war. These facts show the authority which the defendant had to bind the government, and the purpose for which the contract was made. The contract, then, being made by a public officer of the government, having authority therefor, and
*356] for the use of the government, is *primâ *facie* a public, and not an individual, contract.

The question then is, whether the defendant has pledged his individual credit, in addition to that of his government. This depends upon the intention of the parties; for the intention of the parties in all cases constitutes the contract. This intention is to be known by the words they have used;

but if those words are doubtful, resort may be had to other facts, such as the subject-matter of the agreement, the purpose for which it was made, and the official character of the parties, or either of them. But in the present case, the words of the instrument itself seem to leave no room to doubt. In the premises, the defendant is styled secretary at war, and throughout the whole deed, when he is mentioned, he is called the said Samuel Dexter, referring to the official description contained in the premises; and in the conclusion, it is said, that the said parties have thereunto set their hands and seals. The word "successors" also is used, wherever the name of the defendant occurs in the instrument; and whether he was competent to bind his successors or not, yet it shows the intention of the parties, and the character in which the defendant meant to contract. It shows also, who was to occupy the premises, after the defendant should cease to be secretary at war. The plaintiff himself also has clearly shown what his understanding was, at the time, by covenanting on his part that the successors of the defendant should quietly occupy and enjoy the premises during the term. This shows that the plaintiff understood he was contracting with a public officer, for public purposes.

But great stress is laid upon the word "himself." The said Samuel Dexter, for himself, and his successors, covenants to keep the premises in repair. How does he covenant for himself? Clearly, for himself while in office, and as the representative of the government, his principal. The same arguments which show this to be a public contract, explain and limit the meaning of the word himself. Who is "himself"? The said Samuel Dexter. Who is the said Samuel Dexter? The premises say, Samuel Dexter, secretary at war.

The case of *Macbeath* v. *Haldimand*, 1 T. R. 172, is a much stronger case against the individual than the present, and yet the court had no hesitation in declaring it to be a public contract, and that the individual was *not liable. In that case, nothing was said expressly of contracting on account of the government, or for himself and his successors. In [*357 order to show that the defendant meant to pledge his individual credit, in addition to that of his government, the plaintiff ought to make out a very strong case, in express terms; for if public agents are to be made liable upon presumptions arising from equivocal expressions, no prudent man will undertake to conduct the public business, where, of necessity, contracts must be made to an immense amount. If a doubt exists, the construction ought certainly to be in favor of the agent.

The case of *Unwin* v. *Wolsely*, 1 T. R. 674, clearly shows that no difference, in the construction of the contract, can arise from the circumstance of its being under seal. The intention of the contract being to bind the government, it shall not, by reason of the seal, become the contract of the individual who did not mean to bind himself. The only operation of the seal is to raise the agreement from a simple contract to a specialty. The seal, therefore, does not make it the deed of the individual. It is immaterial whether the words "on account of his majesty," make the case of *Unwin* v. *Wolsely*, a stronger case in favor of that defendant than the present. The case is not cited to compare those facts with these, but to show that the seal makes no difference between that case and the case of *Macbeath* v. *Haldimand*.

2d Point. Inevitable casualty. The objections to this plea seem to be,

that it throws the *onus probandi* upon the plaintiff; and that the facts do not show an inevitable casualty. The plea has stated all that was possible to state; all that was within our knowledge; and if they do not show the case to be *primâ facie* within the exception of the covenant, the plea is bad. No form of plea which the defendant could have pleaded, as to this point, would have laid the *onus probandi* on him. The exception of inevitable casualties is in its nature a negative. One of the counts in the declaration avers the *destruction of the buildings to have been by an evitable casualty. Upon this averment, the defendant might have taken issue, and said, it was not by an evitable casualty, or, in the words of the lease, that it was by an inevitable casualty, which is equally a negative proposition; and in either case, the proof would lay on the plaintiff. So, if the defendant had pleaded, that the accident happened notwithstanding he had used the utmost care and diligence to prevent it, the plaintiff must have replied some act of negligence. For it cannot be supposed, that the defendant should show particular instances of his care for every moment of his occupation, during the whole term. Suppose, the defendant had pleaded, that the fire arose by accident in the adjoining house, and communicated to the house in question (this example is assumed under an impression that such was the fact), would that have been more satisfactory to the plaintiff than the present plea? He would still have to show that the defendant had not used reasonable means to avoid its effects. In the case of *Monk* v. *Cooper*, 2 Ld. Raym. 1477, the form of pleading is not more certain than the present; and is the form which has been ever since used in cases of destruction by fire.

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It is understood, that the learned gentleman who is to close this argument has given an opinion, and means to contend, that inevitable casualty means the act of God. But surely, it cannot mean an accident only evitable by the power of the supreme being. Death is usually termed the act of God; but death may be by human means, which may often be avoided; as in the case of murder. So, death may be the consequence of unskilfulness of the physician, and might have been avoided by employing a man of more skill. So, a man, by exposing himself to a storm, may take cold, and death may ensue; which might have been avoided, by not exposing himself to the storm. Yet in all these cases, the death is said to be the act of God. An inevitable casualty, therefore, is not always the act of God; but must mean, in the present case, a casualty inevitable by the defendant. It cannot mean, a casualty evitable only by the united exertions of the whole human race. A whirlwind is said to be the *act of God, yet its effects may be prevented, by building a wall of brass about the house of sufficient strength. So, the effects of lightning may be prevented by proper conductors; and the ravages of enemies may be impeded by a sufficient human force. These examples are cited, to show that the term inevitable casualty cannot be confined to those accidents which are usually termed the acts of God; nor to such as are inevitable, notwithstanding the united exertions of all the world. Where, then, is the line to be drawn? It is believed, that the true meaning of the expression is, such accidents as cannot be prevented by reasonable care and diligence.

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But even taking the expression to be confined only to those accidents which are called the act of God, yet there are not wanting old authorities

which expressly call a sudden fire the act of God, although more modern writers have very properly termed it an inevitable accident. 1 Roll. Abr 808, pl. 6, under the head of "what acts shall excuse an escape," says, "so if the prisoners escape by sudden fire, this shall excuse the escape, for this is the act of God." And in Dyer, 66 *b*, 15, it is said, "if he plead that the prison was broken by enemies of the king, or by sudden fire, which is the act of God, or by such force or vehement power that he could not resist, this is good matter.

The case of *Forward* v. *Pittard*, 1 T. R. 27, is a very strong one upon this point. There was a verdict for the plaintiff, subject to the opinion of the court upon the following case: That the defendant was a common carrier from London to Shaftesbury; that on Thursday, the 14th October 1784, the plaintiff delivered to him, on Weyhill, twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftesbury, by his public road-wagon, which travels from London, through Andover, to Shaftesbury. That by the course of travelling, such wagon was not to leave Andover until the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth, at the distance of about 100 yards from the booth in which the defendant had deposited the hops, *which burnt for some time, with unextinguishable violence, and during that time, communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them, without any actual negligence in the defendant. That the fire was not occasioned by lightning." The counsel for the plaintiff in that case contended, that a carrier is liable in all cases, except the loss be occasioned by the act of God or the king's enemies: and a distinction is taken between the act of God and inevitable accident. The counsel for the defendant insisted, that he was not liable for accidents happening without any default or negligence of the carrier. Lord MANSFIELD said, there was "a nice distinction between the act of God, and inevitable necessity. In these cases (of common carriers), actual negligence is not necessary to support the action." Afterwards, Lord MANSFIELD delivered the unanimous opinion of the court. "It is laid down, that a carrier is liable for every accident, except by the act of God, or the king's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests. If an armed force come to rob the carrier of the goods, he is liable; and the true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case is liable, inasmuch as he is liable for inevitable accident."[1]

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*The court in that case call a fire arising from the act of man, an inevitable accident, but decide, that the carrier is liable, inasmuch as

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[1] And see Merritt *v.* Earle, 29 N. Y. 115.

he is liable for inevitable accident; being considered as an insurer. There, the case shows that the fire arose from the act of man; but inasmuch as it was without any default of the carrier, the court called it an inevitable accident. In the present case, the plea states, that against the will, and without the negligence or other default of the defendant, the building was consumed by fire, arising from some cause then and yet wholly unknown to the defendant. The only difference in the two cases is, that in the case of the carrier, the fire appeared to have arisen from the act of man, but in the present case, the cause of the fire is wholly unknown. If the former was justly called an inevitable accident, *à fortiori*, the latter ought to be so called.

In Comyns' Rep. 631, destruction by fire is admitted by the counsel on both sides to be an unavoidable accident. In Jones on Bailments, a work remarkable for the correctness and precision of its language, p. 90, Amer. ed. (p. 49, English ed.), is this expression: "If they be destroyed by wreck, pillage, fire or other inevitable misfortune." In page 93 (51), he cites a paragraph from Puffendorf, "that the borrower ought to indemnify the lender, if the goods lent be destroyed by fire, shipwreck or other inevitable accident." In page 97 (53), he says, "there are other cases, in which a borrower is chargeable for inevitable mischance; for example, if the house of Caius be in flames, and he be able to secure one thing only," &c. And in p. 142 (78), "there is no obligation in the bailee to suggest wise precautions against inevitable accident, and he cannot, therefore, be obliged to advise insurance from fire." In page 146 (79, 80), he says, "although the act of God be an expression which too long custom has rendered familiar to us, yet, perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place inevitable accident." See also p. 135 (73), 146 (79, 80), 149 (81, 82), 32 (18), as to the peculiar law respecting innkeepers and common carriers, and as to the general principle, that the bailee is liable only for negligence, the degree of which is regulated by the nature of the bailment.

*362] *The authorities thus cited show that fire, in former times, was called the act of God, but in latter days, it is termed, in the very expressions of the lease, an inevitable accident, an inevitable casualty, an inevitable mischance, or an unavoidable accident, by lawyers, by judges, and by elementary writers. The presumption, therefore, is strong, that the case of fire was the very case of inevitable casualty, which the exception in the lease was intended to guard against.

3d. As to the third point. It is immaterial, whether this be considered as the contract of the officer in his official capacity, or of the government, and whether an action will or will not lie against the successor. That question can only be of importance, as it concerns the mode of the remedy, but does not affect the point of personal liability. It would be ruinous, not only to the agent, but to the government itself, if this doctrine of individual responsibility is to be established. Suppose, the defendant, or his successor, had been dispossessed by the plaintiff, during the term, who would have the right of action? If the defendant, after he was out of office, had the sole right to sue, the office must be at his mercy. He might release the contract. Suppose, a contract made by the secretary at war, for supplying the army, and advances, as usual, made to the contractor. Suppose, the sum advanced to be $50,000 (which in such cases is not a large sum), and the contractor pockets the money, and refuses to

make the supplies. The secretary becomes bankrupt, or refuses to bring suit, or dies, and his executors refuse to sue. How are the public to compel them? Is it consistent with the dignity of the United States, to ask their leave to bring suit? There is now existing a contract for the casting of cannon, made by the defendant while in office. Can the secretary, out of office, release this contract? Can he give a valid release of the contract for supplies to the army? These examples show that the ex-secretary is not the person contracting, and that the suit is brought against the wrong person.

Mason, on the same side, was stopped by the court, who said, they were satisfied with the argument on the *part of the defendant, upon the first point, and wished to hear the counsel in reply. Mr. *Martin* [*363 observed, that he did not suppose that anything he had to offer would shake the opinion which the court seemed to have formed, and should not insist upon replying.

March 2d, 1803. The CHIEF JUSTICE, after stating the terms of the lease, and the pleadings, delivered the unanimous opinion of the court.

The plaintiff in error has made two points. 1st. That under this contract, the defendant was bound in his private capacity. 2d. That the matter pleaded in his plea, did not show the casualty, by which the buildings were destroyed, to have been inevitable. This court give no opinion on the second point, being unanimous in favor of the defendant on the first.

It appears from the pleadings, that congress had passed a law authorizing and requiring the president to cause the public offices to be removed from Philadelphia to Washington; in pursuance of which law, instructions, by the president, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war-office, and that for this purpose, and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government, are public and not personal. They inure to the benefit of, and are obligatory on, the government; not the officer. A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become *a [*364 public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macbeath* v. *Haldimand*, cited from 1 Term Reports; and this court considers the principles laid down in that case as consonant to policy, justice and law.

The plaintiff has not controverted the general principle, but has insisted, that, in this case, the defendant has, by the terms of his contract, bound himself personally. It is admitted, that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department, for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government; or that he was unwilling to contract on the faith of gov-

ernment. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government. The official character of the defendant is stated in the description of the parties. This, it has been said, might be occasioned by a willingness in the defendant to describe himself by the high and honorable office he then filled. This, unquestionably, is possible, but is not the fair construction to be placed on this part of the contract, because it is not usual for gentlemen, in their private concerns, to exhibit themselves in their official character. The tenement is to let to "the said Samuel Dexter, and his successors;" an expression plainly evidencing that it was not for himself, otherwise than as secretary of war; and that the lessor so understood the contract. It is also evincive of the correctness of the observation of the defendant, that the words "said Samuel Dexter" refer to him in his official character, as described in the premises. The *habendum* is, "to have and to hold the said
*365] demised *premises to him, the said Samuel Dexter, and his successors," &c., showing, that to the knowledge of the lessor, if Mr. Dexter should go out of office the next day, the successor to the war department would succeed also to the occupancy of the office.

The covenant for quiet enjoyment during the term is with the said Samuel Dexter, and his successors, and is, that they, as well as he, shall enjoy. The covenant on the part of Mr. Dexter, on which the suit is brought, is for himself, and his successors. The whole face of the agreement, then, manifests very clearly a contract made entirely on public account, without a view, on the part of either the lessor or lessee, to the private advantage or responsibility of Mr. Dexter.

The only circumstance which could excite a doubt was produced by the technical operation of the seal. This, in plain reason and common sense, can make no difference in designating the person to be responsible for the contract; and so it has been determined in the case cited from 1 T. R. 674 (*Unwin* v. *Wolsely*).

The court is unanimously and clearly of opinion, that this contract was entered into entirely on behalf of government, by a person properly authorized to make it, and that its obligation is on the government only, Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he must resort to have them satisfied.

Judgment affirmed, with costs.