Some slight evidence was given in the court below, upon the question whether the agreement of the 6th of September was sealed at the time of the execution. But the instrument produced was sealed, and is recited in the subsequent agreement of the 12th November, as an agreement signed and sealed by the parties.

A question was also made, as to the authority of the Shoe Associates to grant a license to the defendants. But they held under Goodyear the right to the exclusive use of the improvement for the manufacture of boots and shoes. They were competent, therefore, to confer the right upon the defendants. Besides, the point is not material in the view the court have taken of the case, as upon that view no interest in the patent vested in the plaintiff under the assignment from Chaffee.

It will be seen, by a reference to the bill of exceptions, that upon our conclusions in respect to several points raised in the case, the rulings in the court below were erroneous, and consequently the judgment must be reversed, and a venire de novo awarded.

Horatio N. Slater, Plaintiff in Error, *v.* Charles Emerson.

Where a railroad company became embarrassed, and were unable to pay the contractor, and a person interested in the company agreed to give the contractor his individual promissory notes if he would finish the work by a certain day, the contractor cannot recover upon the notes, unless he finishes the work within the stipulated time.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Massachusetts.

The facts are stated in the opinion of the court.

It was argued by *Mr. Bates* and *Mr. Bartlett* for the plaintiff in error, and by *Mr. Hutchins* upon a brief filed by himself and *Mr. Choate* for the defendant.

The following points on behalf of the plaintiff in error are taken from the brief of *Mr. Bartlett*, as being more condensed than those stated in the brief of *Mr. Bates:*

I. The single question is, whether by the true and rational construction of the contract it was agreed and understood between the parties that the doing the work within the time pre-

scribed was a condition on which the obligation of plaintiff to give his notes was to depend.

a. It is not sufficient to say that the parties, if such was their intent, might have expressed it so in terms, or might have secured damages for non-performance by an independent covenant. The books abound in cases where parties having inartificially expressed their purpose, the court have construed their agreement to be dependent. This want of express terms, therefore, though it may possibly lead in doubtful cases to a presnmption, is of value solely in that contingency.

b. We are to find, then, either from the reason of the thing, looking at the position of the parties and the surrounding circumstances, or by the application of the settled rules of construction, or by both, what was the intent of the parties; and,

1. The position of the parties is new and unusual. It is believed that a similar case is not to be found in the books. Usually the controversy is between a party contracting to perform and a party who is to enjoy the benefit of the thing to be performed. Here the question is upon the construction of a contract collateral to another, between other parties, which may be called the principal contract; and the entire direct fruits of performance are to be enjoyed by one of those other parties.

2. The extrinsic evidence shows that at the time of making the contract in question another negotiation was, with the knowledge of all parties, pending between one of the parties to the principal contract and a third party, of great pecuniary importance, the consummation of which was entirely dependent on the ability of one of the parties to open its road at a fixed time. That *fixed time was the precise period prescribed for the completion of the work by the contract in question.* (Ammidown's Testimony.)

3. Such are the surrounding circumstances, and before examining the terms of the contract and the settled rules of construction, it may be fairly asked whether defendent in error, who was already performing and bound to perform the work under another contract for the same remuneration, would be likely to agree that the covenant of plaintiff in error should be dependent, and this, too, when the notes to be given him were not to pay for the labor to be performed under the contract, but to an existing indebtedness of railroad to defendant in error. (Willis's Testimony.) And also whether plaintiff in error would be likely to make any other than a dependent agreement to pay on condition an old debt of a third party.

II. With these preliminary views, we proceed to examine the terms of the contract, and the usual rules of construction.

a. The terms of agreement by defendant in error are, "that he will *complete* all the bridge work *to be done by him for the Boston and New York Central railroad,* ready for laying down the iron rails for one track, *on the first day of December next.*

b. The agreement on the part of the plaintiff in error is, "that, in *consideration of the premises,* he will pay, within two days from the date hereof, the sum of $4,400 in cash; and that he will give said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, his five notes for $2,000 each, payable in six months; *said notes, when paid, to be applied toward the indebtedness of said Railroad Company to said Emerson.*"

1. The agreement on the part of plaintiff is "*in consideration of the premises,*" and technically these are apt words to create a condition. (Thorpe *v.* Thorpe, 1 Ld. Raymond, 665; Ackerly *v.* Vernon, Willes, 157.)

2. That the agreement to give the notes was at least dependent upon prior performance, would seem free from all doubt. This is tested by considering whether an *action on the contract could have been maintained before the work was done.*

It falls clearly in this respect within the technical rule. "When a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed," no action can lie. (Bean *v.* Atwater, 4 Connecticut, 9; Pordage *v.* Cole, 1 Saunders, 320; Day *v.* Dox, 9 Wendell, 129.)

The fact that the notes were not to be given upon performance, but at a period after performance, does not affect it. This only shows that it does not belong to another class of dependent agreements, viz: Where two acts are to be done at the same time, or cases of concurrent covenants, as they are called. (Glazebrook *v.* Woodrow, 8 T. R., 374; Williams *v.* Healy, 3 Denio, 363; Gainzly *v.* Price, 16 Johnson, 267.)

3. Nor does the fact that payment of part of the consideration (viz: the $4,400) was to be made before performance, affect the question whether the agreement for a final payment was dependent or independent. The old case of Terry *v.* Duntzie, (2 Henry Blackstone, 389,) from which the opposite doctrine was derived, was unfounded in reason, and has been declared not to be law here and in England. (Cunningham *v.* Morrell, 10 Johnson, 203; Hopkins *v.* Elliot, 5 Wendell, 496; Grant *v.* Johnson, 1 Selden, 247; Johnson *v.* Reed, 9 Mass., 78; Lord *v.* Belknap, 1 Cushing, 279; Watchman *v.* Crooke, 5 Gill and Johnson, 254; Bean *v.* Atwater, 4 Connecticut, 4; Kettle *v.* Harvey, 21 Vermont, 301; McClure *v.* Rush, 9 Dana, 64.)

4. But it may be said, that although performance was a con-

dition precedent to delivery by plaintiff of his notes, yet performance *within the time* was not so.

a. It is important on this point to distinguish between the question whether non-performance within the time will, because of the agreement being dependent, defeat a recovery *on the contract itself*, and the question whether, notwithstanding such non-performance, assumpsit will not lie to recover for the labor and materials.

b. It would seem to be the settled rule, both here and in England, that if plaintiff has not performed the work in exact accordance with the contract, and there has been no waiver, he cannot recover on the contract, but must recover, if at all, on the common counts for his labor and materials. (2 Greenleaf's Evidence, secs. 104, 136; Chapel *v.* Hicks, 2 Crompt and Mee, 214; Read *v.* Banner, 10 B. and C., 440; Alexander *v.* Gardner, 10 Bingham N. C., 671; Chater *v.* Leese, 4 M. and W., 295, 311; Jewell *v.* Schroepel, 4 Cowen, 564; Ladua *v.* Seymour, 24 Wendell, 62; Britton *v.* Turner, 6 N. H., 481.)

c. Unless, therefore, time of performance might, in a declaration on the contract, be wholly omitted, this case falls within the rule, and plaintiff would be remitted to his common counts; that it could not be so omitted, plaintiff in error refers to Phillips *v.* Rose, 8 Johnson, 393; Jewell *v.* Schroepel, 4 Cowen, 565; Smith *v.* Guyarty, 4 Barbour, 615; Ladua *v.* Seymour, 24 Wendell, 61; Gregory *v.* Hincks, 3 Hill, 380; Watchman *v.* Crooke, 5 Gill and Johnson, 254; Farnham *v.* Ross, 2 Hall, 167.

d. As to to the right of defendant in error to recover on common counts, no discussion is necessary. The ruling excepted to declares the agreements to be independent, and that recovery may be, and it was in fact, had upon the counts on the special contract.

III. But, besides and beyond the artificial rules above adverted to, and under which it is submitted plaintiff in error is safe, there are others, founded on the plainest principles of equity and justice, which have guided, if not controlled, the courts, in their construction of this class of contracts; and it is upon these and their application that the case must turn.

Of these, the principal ones are—

1. Where non-performance by plaintiff deprives the defendant, not of part, but of the entire consideration of the contract, the agreement of defendant shall be deemed dependent. (Pordage *v.* Cole, 1 Wms. Saunders, 320; Duke St. Albans *v.* Shore, 1 H. Black, 270; Dakin *v.* Williams, 11 Wendell, 67; Atkinson *v.* Smith, 14 M. and W., 695.)

2. Where defendant, in case of plaintiff's non-performance,

has no other remedy for the injury he sustains except by declaring his agreement dependent. (Pordage *v.* Cole, 1 Wms. Saunders, 319.)

3. Where the amount of the consideration which defendant will be absolved from paying plaintiff, if his agreement be deemed dependent, is not, or may not be, commensurate with the injury sustained by plaintiff, or, in the language of this court, there "is no natural connection" between the two; in such case, defendant's contract shall be construed to be independent.

In discussing the application of these principles, plaintiff in error submits at the outset, that almost all the rules of construction in this class of cases are founded upon a struggle of the courts to avoid the old and long-standing doctrines of forfeiture. Thus the rule, that in case of failure to perform, when such failure deprives defendant only of part of the consideration to be received by *him*, the agreement shall be deemed independent, is founded solely on the ground of forfeiture, and the want of equity in allowing defendant to keep and enjoy the labor and materials of the plaintiff without compensation. So, also, the doctrine, that there is no natural connection between the sum due plaintiff at the time of breach, and the injury sustained by defendant by such breach, proceeds wholly on the thought that the sum so due is forfeited by the breach.

But in the class of cases to which the present one belongs, the doctrine of forfeiture is exploded, and it is well settled that the value of the labor and materials to defendant may be recovered on *quantum meruit* notwithstanding the breach.

The reason of the rule having therefore ceased, the doctrine will bear revision.

a. As to the first of the above rules, plaintiff in error submits that the failure to perform by defendant, although it left the fruits of his labor in the hands of the railroad, with whom he contracted to do it, and who are fully bound to pay him for it, yet deprived plaintiff in error of the whole consideration for which he made the contract, viz: the time within which performance was to take place.

b. It is important to note that the doctrine regards merely *the question of consideration moving from plaintiff to defendant*, not the consideration arising from plaintiff's altered condition in consequence of the contract. It seeks to avoid circuity of action which would arise if plaintiff recovered the agreed sum, and defendant, by cross action, recovered it back. (Duke of St. Albans *v.* Shore, 1 H. Black., 270; Pordage *v.* Cole, 1 Wms. Saunders, 319; Dakin *v.* Williams, 11 Wendell, 67; Atkinson *v.* Smith, 14 M. and W., 65.)

1. The necessity for making time a condition of the contract, and the probability that both parties would assent to make it so, have been adverted to, and plaintiff in error now submits, that unless time was the whole consideration, moving from defendant in error to plaintiff in error, there was no consideration at all.

a. For there was already a contract between the defendant in error and the railroad (subsisting and referred to as obligatory in this very contract) to do this same work, the terms of which were not varied one word, except in relation to this very matter of time. The matter of time, then, was the only change effected, and the only benefit derived to plaintiff in error.

b. If both contracts had been made by plaintiff with the railroad, would there have been any other consideration to support the additional contract except time?

c. It cannot be said that the work was done for the plaintiff, or at his request, or for his benefit, so as to form a consideration moving from the defendant in error to him—for it was to be performed, so far only as time was concerned, at his request, and its direct benefit was solely to the railroad.

His relation to the railroad was merely that of an officer, a creditor, and a stockholder; and it is believed that upon no known principles of law could damages be ascertained and assessed in his favor, for a deprivation of such a remote benefit, if defendant in error had failed to perform.

2. This last suggestion, if well founded, emphatically supports the second of the above grounds, viz: that the only remedy plaintiff in error can have for the breach of his agreement by defendant, is to construe his covenant to give his notes to be dependent on complete performance by defendant.

3. The last ground which is often relied on to show the covenants to be independent is, that there is no natural connection between the sum which is claimed to be paid defendant in error and which plaintiff seeks to withhold, and the amount of damages which plaintiff may sustain by defendant's non-performance.

a. If plaintiff in error had in fact received and was now enjoying the results of defendant's labor and materials, and if non-performance would leave defendant in error without remedy, this would be a forcible reason for holding the covenant of plaintiff in error to be independent.

b. But even in such case, as it is settled that no forfeiture is incurred, but defendant might, as against party enjoying the benefit of his labor and materials, maintain an action for his *quantum meruit* in which the injury by non-performance might

be set off and adjusted, it is submitted that the harmony of the law and the symmetry of pleading, which requires in actions on special contracts an allegation of complete performance, would be best preserved by obliging the party to resort to the common counts.

c. But, however this may be in other cases, in this case plaintiff in error does not hold and enjoy the benefit of defendant's labor and materials, but a third party, who has contracted with defendant to pay for them. The defendant is not without remedy against that party, and there may be said to be a natural connection between the amount which defendant in error loses, which is nothing, and the damage which plaintiff in error could recover for breach, which by law cannot, by reason of remoteness, be shown to be anything. In other words, the rule and its reason has no application to a collateral contract, in its nature a guaranty, when, for want of strict performance of the terms of the guaranty, one party has lost his remedy, and the other received no appreciable benefit.

IV. The remaining exception is to the ruling of the court, compelling plaintiff in error to prove and adjust his damages for breach of the contract by way of offset, recoupment, or reduction of damages of defendant in error in this action, and thus depriving him of his election to bring a cross action.

Plaintiff in error has been able to find no case in which the doctrine is established, that it is compulsory on a defendant to come prepared with his proofs of such damage, or have the damages assessed at a nominal sum, and be barred of his cross action. The question may be important in this case, the principle is fit to be settled, and plaintiff in error submits that the ruling was wrong.

V. The statement of counsel to Emerson should have been admitted to show that, in opinion of Emerson, the work could have been done by December 1st.

Points of defendant in error:

I. The first exception is as follows: "The defendant offers to prove, that just prior to the signature of the contract, both parties being present, the counsel of the plaintiff told him that, unless he was sure that he could complete the bridges by December first, he ought not to sign the contract, and could not recover if he did not complete them by December first; but the court refused to admit the same." To which refusal the defendant excepted.

Such testimony was clearly inadmissible. The contract must speak for itself. The conversations of the parties, their understandings and expectations, and the suggestions of counsel,

cannot affect or control the construction of this contract. This would be to vary or modify its terms by parol. (1 Greenleaf on Evidence, sec. 275, p. 327; Weatherhead's Lessee *v.* Baskerville, 11 Howard; Van Buren *v.* Digges, 11 Howard, 461; Grant *v.* Naylor, 4 Cranch, 224.)

II. The second exception is as follows: "The defendant offers to prove that, at the time the contract was drawn up, the element of time was talked over by the plaintiff and the defendant, and that plaintiff assented that time was the essence of the contract; but the court refused to admit the same." To which refusal the defendant excepted.

The same answer may be made to this as to the first exception. When the contract is reduced to writing, all the conversations of the parties, leading up to it, are merged in it. (1 Greenleaf on Evidence, sec. 275, p. 327.)

III. The third exception is as follows: "The defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared upon, the plaintiff would not be entitled to recover, without showing that the work was completed, ready for laying down the rails for one track, by the first day of December, 1854; but the court refused so to instruct the jury, but did instruct them, that the agreement on the part of the defendant, to give the notes in said agreement mentioned, was not dependent upon the completion of said work, ready for laying down said rails for one track, at the time limited by said contract." To which ruling the defendant excepted.

It is sometimes difficult to determine whether covenants and promises are dependent or independent. Some rules of construction are laid down in the books, but, after all, each case is to be governed by its own circumstances. (Philadelphia W. and B. R. R. Co. *v.* Howard, 13 Howard, 307.)

1. The courts incline to consider covenants and promises independent, rather than dependent, to save forfeitures. The burden is on him who alleges dependency. (Platt on Covenants, p. 35, [78, 79,] Law Library, vol. 3.)

If there are no terms which import a condition, or which expressly make one promise dependent on the other, they are construed to be independent; and in this contract there are no such. Platt on Covenants, Law Lib., vol. 3, p. 32, [72, 73.]

More than this the terms import the contrary. In that part containing the promise, the *condition of time is wholly omitted*—thus indicating an intention not to make it dependent *on time*, but on *work done.*

2. The failure to perform on the day does not go to the whole consideration, and there is no natural connection be-

tween the amount to be paid for the work done after the day, and the injury or loss inflicted by a failure to perform on the day. (Platt on Covenants, Law Lib., vol. 3, p. 40, [90, 94;] Philadelphia W. and B. R. R. Co. *v.* Howard, 13 Howard.)

3. The forfeiture of the amount to be paid for the whole work, in consequence of its not being completed by the day, would be unreasonable in this case. By construing the promises as independent, the plaintiff can recover his *exact* damages (if any) or have them recouped. Thus the rights of both parties are secured. Platt on Covenants, vol. 3, Law Lib., p. 40, [90.]

4. The defendant in error completed the bridges. The plaintiff in error has had the benefit of his labor. The objection is, that it was not done *at the day*, (for which, however, the plaintiff in error claimed no damages.) It would be manifestly inequitable for the plaintiff in error to receive the benefit of this labor without paying for it. The objection taken is *technical*, and ought not to be sustained, unless the language is clear, and the rule of law imperative. (Philadelphia *v.* W. and B. R. R. Co., 13 Howard, 307; Van Buren *v.* Digges, 11 Howard, 461.)

5. The promise of the plaintiff in error was not dependent upon the completion of the bridge work by December 1st, because the notes were not to be given upon the completion of the bridges. Something *more* was to be done, to wit, the laying of the rails by another party. How can the promise of the plaintiff in error be said to be dependent upon the completion of his work by December 1st, when the completion of the work at that time would not then entitle the defendant in error to his notes?

6. When the acts stipulated to be done, are to be done at *different times*, the stipulations are to be construed as independent of each other. (Goldsborough *v.* Orr, 8 Wheaton, 217.)

Taking this decision as a guide, these promises must be construed as independent; for the promise of the defendant in error was to complete the bridges by December 1st, whereas the promise of the plaintiff in error was not to give the notes at that time, *but when the rails were laid.*

7. The plaintiff in error promised to pay the defendant in error $4,400 in cash, within two days from the date of the contract, and to give his notes upon the completion of the bridges and laying the rails. So far as this *cash* payment is concerned, the promise is clearly *independent*, as it necessarily preceded the completion of the work. If the construction contended for by the plaintiff in error be adopted, the *same* promise will be construed both as *dependent* and *independent*—

dependent as to the giving the notes, independent as to the payment of cash. Platt on Covenents, Law Library, vol. 3, p. 43, [96.]

IV. The fourth exception is as follows: "The defendant further requested the court to rule and to instruct the jury, that if the plaintiff failed to complete said work, ready for laying down the iron rails for one track, by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury." To which refusal the defendant excepted.

Very clearly, these instructions ought not to have been given. The consideration of the plaintiff in error's promise to pay the money and to give the notes, was the promise of the defendant in error *to do the work*, and not merely his promise to *do it by December 1st.* He having completed the work to their acceptance, there was clearly not a *total failure* of consideration.

V. The last exception is as follows: "His honor the judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract, and the defendant declining to offer any such evidence, and admitting that no such actual damage was claimed by him in this suit, the court thereupon instructed the jury to deduct from any sum they might find for the plaintiff the sum of one dollar, as nominal damages for the said non-performance of plaintiff." To which direction the defendant excepted.

It is difficult to discover what there is objectionable in this direction. Undoubtedly, the plaintiff in error was entitled to have deducted in this suit any damage which he could show that he had sustained from the non-performance of the work within the time limited by the contract; and if the court had refused to admit testimony of such damage, he might well have excepted; but he expressly waived all claim to damage in this suit. In the absence of any proof or claim by him, the court directed a deduction of nominal damages. What more or different could the plaintiff in error require? (Winder *v.* Caldwell, 14 Howard, 434.)

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on a writ of error to the Circuit Court of Massachusetts.

The action was brought by Emerson against Slater, on an agreement made the 14th day of November, 1854, in which Emerson, "in consideration of the agreement of said Slater,

hereinafter contained, and of one dollar to him paid, covenants and agrees, with said Slater, that he will complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

"And the said Slater, in consideration of the premises, hereby agrees, with said Emerson, that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars, in cash. And the said Slater further agrees, that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five notes, for two thousand dollars each, dated when said notes were given, as above provided, and payable in six months from their date, to the said Emerson or his order. Said notes, when paid, are to be applied towards the indebtedness of said Boston and New York Central Railroad Company to said Emerson; it being understood that this agreement is in no way to affect any contract of said Emerson with said company, or any action now pending."

The execution of this agreement was admitted, and that the work upon the bridges, in said agreement set forth, was completed, ready for laying down the iron rails for one track, about the middle of December, 1854, and that the rails were laid to the foot of Summer street, in Boston, from Dedham, about the last of the same month.

It was proved that the defendant was President of the Boston and New York Central Railroad Company, and a stockholder and bondholder in the same. The corporation failed on or about the 2d of July, 1854. The company was then indebted to the plaintiff, and did not pay him. In the second week of July, there was a crisis in the affairs of the company, and Emerson suspended his work, so far as regarded new outlays. In August a new arrangement was made, and he went on till the first or second week in November, and then he kept a force on the great bridges sufficient to retain possession of the work, and would not surrender it; the witness (Willis) then made an effort to get the bridges completed. The question was, how much Emerson would take. The company owed him some ten to fifteen thousand dollars, and was then insolvent as respected meeting its engagements.

The defendant then introduced an agreement between the Boston and New York Central Railroad Company, a corporation, and Charles Emerson, of Boston, in which Emerson agreed to build and complete, sufficient for the passage of an engine over the same, on or before the first day of May next,

all the bridging as now laid out and determined upon by the engineer of said railroad, from the wharf near the foot of Summer street, in Boston, and from South Boston across the South Bay, so called, to the Dorchester shore, in Dorchester, in the manner and with the materials hereinafter described, and to finally complete the same to the satisfaction of the State commissioner and the engineers of said railroad, as soon after the first day of May next as may be. Several other bridges were required to be built on the road, Emerson furnishing all the materials, excepting the iron rails, chains, and spikes, which were to be furnished by the Railroad Company. This contract was dated the 23d of December, 1853, and signed by the parties.

A receipt, dated November 15th, 1854, signed by Emerson, acknowledged the payment of forty-four hundred dollars, by Slater, on the contract first above stated.

E. B. Ammidown, a witness, stated he was a director on the railroad, and that in November, 1854, there were negotiations pending for a contract for a through route from Boston to New York, between the Boston and New York Central Railroad Company and the Norwich and Worcester Railroad Company, and the Steamboat Company plying between Norwich and New York. The contract then existing between said Steamboat Company and Norwich and Worcester Railroad Company with the Boston and Worcester Railroad Company would expire about December 1st, 1854. It was necessary that said Steamboat and Norwich and Worcester Railroad Companies should make a new contract. They preferred to contract with us instead of the Boston and Worcester Railroad Company, provided our road could be ready to run by December 1st, 1854. The only part of our road, as to which there was any doubt of its completion, was the bridges, which the plaintiff was making. The whole matter was talked over, in the presence of the plaintiff. We regarded it as of very great importance. I considered the loss of that contract equal to a quarter of a million of dollars, and the plaintiff said half a million. Committees from Norwich and Worcester Railroad and Steamboat Companies came on, to make the arrangement, and went over part of the road. Whether this was before or after the contract the witness cannot say, but he has little doubt that it was before.

J. C. Hurd, a witness, and who was also a director, and as a committee, about the 14th of August, 1854, made a parol contract with Emerson to pay him $17,000, and secure to him $6,000 of Farnum, with endorsements. A larger sum than $17,000, he thinks, was paid at the time of the contract.

Emerson agreed to go on and finish the work, but he declined to sign a written agreement.

On the above evidence, the defendant moved the court to rule and instruct the jury, that by the true construction of said contract declared on, the plaintiff would not be entitled to recover without showing that the work was completed, ready for laying down the iron rails for one track, by the first day of December, 1854; but the court refused so to instruct the jury, and did instruct them that the agreement on the part of the defendant to give the notes in said agreement mentioned was not dependent on the completion of said work, ready for laying down said rails for one track, at the time limited by said contract. To which ruling and refusal the defendant excepted.

And the defendant further requested the court to rule and instruct the jury, that if the plaintiff failed to complete said work, ready for laying down said iron rails for one track, by the said first day of December, there was thereby a failure of the consideration of said contract, and the plaintiff would not be entitled to recover the amount claimed by him, or any part thereof; but the court refused so to instruct the jury. To which refusal the defendant excepted.

The judge having first called upon the defendant to offer evidence, if he saw fit, of any actual damage by him sustained by the non-performance of said work within the time limited by said contract; and the defendant declining to offer any such evidence, and admitting that no such damages were claimed by him in the suit, the court thereupon instructed the jury to deduct, from any sum they might find for the plaintiff, the sum of one dollar—as nominal damage, for the said non-performance of plaintiff. To which the defendant excepted.

The jury found for the plaintiff ten thousand one hundred and ninety-nine dollars.

The declaration contains four counts. The first one alleges the work was completed by the 1st of December, 1854; the second, on the 20th of December; third, the same time; the fourth, the same as the second, with an allegation that the defendant waived the time fixed for the work to be completed to the 20th of December.

This contract cannot be satisfactorily understood or construed without reference to the circumstances under which it was made. From the evidence, it appears that the work to be completed by the 1st of December was provided for by a previous contract, dated 17th December, 1851, in which the details and prices of the work were specially stated to be so constructed as to admit of an engine to run over it on or before

the 1st of May ensuing, and the whole to be completed as soon after that period as practicable.

The company, it seems, had become embarrassed, and were unable to make payment for the work as it progressed; still the contractor, Emerson, was unwilling to give up the contract, and retained a few hands in his employ on different parts of the work, so as to retain the possession of it.

Another fact to be noticed as important was, that if the road could be completed by the 1st of December, the company had an assurance that a contract could be made with the Steamboat Company plying between Norwich and New York, making a continuous line between Boston and New York. This was considered an object of great importance—equal, as was supposed by a witness, to a quarter of a million of dollars, and, as the plaintiff supposed, to half a million.

The defendant was President of the Boston and New York Central Railroad—a stockholder and a bondholder in the same; but it does not appear that he had any authority to bind the company, as he entered into the contract in his individual capacity.

Under these circumstances, the contract on which the action is prosecuted was made. It will be at once perceived there was a strong motive to have the work completed by the 1st of December ensuing, by all who had an interest in the Central railroad. The sum to be paid by Slater was not in addition to the price stipulated in the former contract, but in discharge of so much of that contract.

All these facts being admitted or undisputed, we will consider the language of the contract. It states "that the said Emerson, in consideration of the agreement of said Slater, hereinafter contained, and of one dollar to him paid, the receipt whereof is acknowledged, covenants and agrees with said Slater, that he, the said Emerson, will complete all the bridge work to be done by him for the Boston and Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next."

There is no ambiguity in this language. No one can misconstrue it. The work specified was to be completed by the 1st day of December. And the said Slater, "in consideration of the premises," that is, the completion of the work, "hereby agrees with said Emerson, that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars in cash; and the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his (said Slater's) five

notes for two thousand dollars each, dated when said notes are given, as above provided, and payable in six months."

The notes were to be given on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston; and from this it is argued that the covenants in the agreement are independent. Much is found in the opinions of courts and elementary writers in regard to dependent and independent covenants. And it is said, "where the acts stipulated to be done are to be done at different times, the stipulations are to be construed as independent of each other." This, as a general rule, is correct, but it is subject to the intention of the parties, as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used.

The work was to be done by the 1st day of December; and Slater agreed to give his notes, payable in six months after the work was completed; the time of giving the notes, therefore, is referable to the time fixed for the completion of the work. In no just or legal sense can this language be held to enlarge the time limited in the contract.

It is said by some writers, that it is impossible to make time of the essence of the contract where damages may compensate for the delay. But this is not correct as a general proposition. And a more fit illustration of this can scarcely be found than the contract under consideration. The amount of compensation for the work is not increased or diminished by the new contract. The first contract stands in all its force, unaffected by the second, except that the payments made under the second shall be applied as a credit on the first. The obligation assumed by Emerson in the new contract was, to finish the work, as stated, by the 1st of December, in consideration that forty-four hundred dollars should be paid to him in two days, and notes given for ten thousand dollars on the completion of the work. Slater, having no other interest in the work than any other stockholder and bondholder of similar amounts, paid the forty-four hundred dollars, and agreed to give his individual notes for the ten thousand dollars. In this contract he stands in the relation of a surety, and can only be held responsible under his agreement.

That time was an essential part of this contract is clear from the circumstances under which it was made, and the intent of the parties, as expressed. The continuous line to New York was the strong motive to Slater, and that could be secured only by the completion of the work on or before the 1st of December.

The defendant prayed the court to instruct the jury that the

plaintiff could not recover without showing the work was completed, ready for laying down the iron rails for one track, by the 1st day of December, 1854, which the court refused to do. In this, we think, there was error. On a contract where time does not constitute its essence, there can be no recovery at law on the agreement, where the performance was not within the time limited. A subsequent performance and acceptance by the defendant will authorize a recovery on a *quantum meruit.*

It is difficut to perceive any satisfactory mode by which the defendant in the Circuit Court could recoup his damages for the failure of the plaintiff to perform in that action, or by bringing another suit. As a stock and bond holder, his damages would be remote and contingent. To ascertain the general damage of the company by the failure, and distribute that amount among the members of the company in proportion to their interests, would seem to be the proper mode; and this would be complicated, and not suited to the action of a jury.

The judgment of the Circuit Court is reversed, with costs.

FREDERICK SCHUCHARDT AND FREDERICK C. GEBBARD, LIBELLANTS AND APPELLANTS, *v.* WINTHROP S. BABBIDGE AND OTHERS, CLAIMANTS OF HALF OF THE PROCEEDS OF THE SHIP ANGELIQUE.

Where a mortgage existed upon the moiety of a vessel which was afterwards libelled, condemned, and sold by process in admiralty, and the proceeds brought into the registry of the court, the mortgagee could not file a libel against a moiety of those proceeds.

His proper course would have been, either to have appeared as a claimant when the first libel was filed, or to have applied to the court, by petition, for a distributive share of the proceeds.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

The facts are stated in the opinion of the court.

It was argued by *Mr. Cutting* upon a brief filed by himself and *Mr. Hamilton* for the appellants, and *Mr. Benedict* for the appellees.

The arguments of counsel, with respect to the relative rights of the claimants and libellants to the fund in court, are omitted.

With respect to the jurisdiction of the court, *Mr. Cutting's* point was this, viz:

Although courts of admiralty in the United States have no