tect goods from sale by execution. The owner has still an interest, or equity of redemption in them, which is subject to sale; and a purchaser at an execution sale would be entitled to redeem the goods from the deed of trust by paying the debt secured thereby. When the law imposes the lien only upon such goods of the tenant upon the premises *as are subject to execution*, it means to exclude goods which are exempt from execution by some general or special law, such as those which a man is entitled to retain, against all execu tions, for the use of his family or the practice of his trade.

JUDGMENT AFFIRMED.

BOYDEN ET AL. *v.* UNITED STATES.

1. A receiver of public moneys of the United States does not stand in the position of an ordinary bailee; he is bound to higher responsibility. Upon a suit, therefore, on a bond "for the faithful discharge of his trust," such a receiver cannot discharge himself by showing that he was suddenly beset in his office, thrown down, bound, gagged, and that against all the defence he could make the money was violently and without his fault taken from him.
2. Though statutes oblige receivers to pay over when required by the Secretary of the Treasury, a declaration, stating that the receiver had been often requested to pay is enough after verdict, there having been general regulations in force at the time the bond here sued on was given, requiring receivers to pay at stated times.

IN error to the Circuit Court for the District of Wisconsin.

The United States sued Boyden and his sureties on his official bond as receiver of public moneys for the district of lands subject to sale at Eau Claire, in the State of Wisconsin. The bond was given pursuant to the 6th section of the act of May 10th, 1800.* The section enacts:

"The receiver of public moneys shall, before he enters upon the duties of his office, give bond with approved security *for the faithful discharge of his trust.*"

* 2 Stat. at Large, 75.

This bond was conditioned, that if the said Boyden truly and faithfully executed and discharged all the duties of his said office according to law, then the obligation should be void. The breach alleged was, that Boyden had received as receiver $5088, of the moneys of the United States, which he had not paid over to the United States, "although often requested so to do."

The defendants pleaded as one plea, that Boyden had been violently robbed of the said sum of money; and under a notice that they would give in such evidence offered upon the trial to prove that, on the 23d of December, 1859, at Eau Claire, in the State of Wisconsin, while in the land office of the United States for that land district, he the said Boyden, then and there being the receiver of public moneys for said district, and then and there being in the discharge of the duties of his office as such receiver, was suddenly beset by some person or persons to him unknown, and thrown down, and against all defence that he could make, was gagged and bound, and the moneys described in the complaint *violently, and without his fault*, taken from him and carried away.

To the introduction of this evidence the United States objected, upon the ground that the facts as offered to be proved constituted no defence. The court sustained the objection, and the defendants excepted.

Judgment having been given for the United States, the defendant brought the case here.

The assignments of error were:

1. That the evidence offered was improperly rejected.

2. That the declaration did not state a cause of action. This second assignment being founded on the fact that an act of August 6th, 1846,* requires all receivers of public moneys to keep in their possession all of the moneys by them received, until the same is *ordered by the proper department or officer of the government* to be transferred or paid out; and that the amendatory act of March 3d, 1857,† requires

* 9 Stat. at Large, 59, § 6.

† 11 Id. 249, § 3.

persons having moneys of the United States in their hands, to pay them to the Treasurer, the Assistant Treasurer, or public depositary of the United States, *when required by the Secretary of the Treasury, or any other department.*

The case was twice argued.

Messrs. M. H. Carpenter and M. M. Cothren, for the plaintiff in error:

I. The sureties contract for such capacity and fidelity as man may possess, and as may be suitable for the employment of their principal. The duty of the principal is measured by physical possibility. *Their* liability is no greater. They do not undertake that an earthquake shall not swallow up the property of the government; nor that the public enemy, or a robber shall not, despite all resistance that can be made by the custodian, seize, and carry away the funds of the government. At the common law, an officer was not responsible for loss of public or private funds, except upon the ground of negligence or default. This is old law, settled in *Lane* v. *Cotton*, reported by Lord Raymond,* and in *Whitfield* v. *Le De Spencer*, reported in Cowper.† The principle is adopted in our own country, as is seen by the case of the *Supervisors of Albany* v. *Dorr et al.*,‡ where it was held by the Supreme Court of New York, that a "public officer intrusted with the receipt and disbursement of public funds, is not responsible for money *stolen* from his office, where there is no imputation of negligence or other default on his part." Nelson, C. J., in giving the opinion, places emphasis upon the condition of the bond being for the faithful execution of the duties of his office, and says that this condition recognizes the common law rule. The case was affirmed by the Court of Errors.§ The later case of *Muzzy, Supervisor*, v. *Shattuck*,‖ in the same State, which might *appear* to conflict with this decision, was placed upon the construction of a statute, which was peculiar in its provisions, and, in the

* Page 646.
† Page 754.
‡ 25 Wendell, 440.
§ 7 Hill, 583.
‖ 1 Denio, 233.

opinion of the court, rendered the collector a *debtor* for the amount by him collected, and his sureties *guarantors for the payment of the debt.* It therefore does not conflict with *Supervisors of Albany* v. *Dorr*, nor with the common law rule as to official liability; but only interprets and gives effect to a particular statute.

The very terms of the statute of 1800, under which this bond was given, make the receiver an agent, trustee, or bailee. Persons occupying such relations are only responsible for the same kind of negligence that bailees are liable for; and certainly the settled rule is, that bailees in general are not responsible for losses resulting from inevitable accident or irresistible force. It is the government that is to protect the citizen against the public enemy, and the private robber; and not the citizen who is to protect the government against losses by either.

The United States v. *Prescott et al.*,* which might be cited against us, does not apply. In that case the sureties had undertaken in addition to the common law obligation of sureties upon an official bond, that the principal

"Has well, truly, and faithfully, and shall well, truly, and faithfully keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered, by the proper department or officer of the government, to be transferred or paid out. And when such order for transfer or payment has been, or shall be received, has faithfully and promptly made, and will faithfully and promptly make the same as directed."

The conditions of that bond enlarged the obligations of the contractors beyond the contract in this case. And the contract may well have been considered a contract of insurance with the government, that all moneys which might come into the hands of the principal should be paid in the manner stipulated.

Moreover, the rule was only applied to a case of theft

* 3 Howard, 587.

The defence in this case is quite different. It is robbery. Public policy may require such vigilance upon the part of public officers as that theft can never occur. This, upon principle, would render theft no defence. Not so with robbery. That is a crime against which the utmost vigilance cannot guard. If the guardian be strong, the robber may be stronger. If government cannot so administer law as that its own property will be safe from the bandit, it ought to sustain its own losses, unless the citizen has contracted to make them good.

So too, *United States* v. *Dashiel*,* was a case of stealing, while in *United States* v. *Keehler*,† a postmaster in North Carolina, who during the rebellion had paid money of the United States to the rebel authorities, in obedience to a statute of the rebel States, and to "a regular official order under it," was held not discharged, because the case did "not show the application of any physical force to *compel* the defendant to pay." The intimation is, that had force been shown, he would have been held discharged.

II. The declaration does not state any cause of action. From the act of 1846, and the amendatory one of 1857,‡ it is obvious, that until some order is made by the head of the proper department, no cause of action accrues against a receiver. The declaration here does not state that any order or requisition was ever made upon Boyden to transfer or pay over. This being so, there is a judgment without anything to base it upon.

Messrs. B. H. Bristow, Solicitor-General, and W. A. Field and C. H. Hill, Assistant Attorneys-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would

* 4 Wallace, 182. † 9 Id. 84. ‡ *Supra*, pp. 18 19.

then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused.* The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. It is true that in the case of the *Supervisors of Albany* v. *Dorr et al.*,† in the Supreme Court of New York, it was decided in a suit on a bond of a county treasurer, conditioned for the payment of all money that should come into his hands as treasurer, that he was not responsible for the public money feloniously stolen from his office without any negligence, want of due care, or other blame or fault whatever on his part; and this decision was affirmed in the Court of Appeals of that State, only, however, by an equal division.‡ It was rested upon the supposed liability of the officer, *virtute officii*, which it was thought his bond did not increase, and it was supposed to be sustained by *Lane* v. *Cotton*,§ and *Whitfield* v.

* Metcalf on Contracts, 213; The Harriman, 9 Wallace, 161.

† 25 Wendell, 440. ‡ 7 Hill, 583. § 1 Lord Raymond, 646.

*Le De Spencer.** It is quite plain, however, that those cases do not sustain it. They were actions upon the case against the Postmaster-General, brought not by the government, but by private individuals to recover damages for the negligent failure to deliver letters, and the defendants were held not liable for money stolen, even by their subordinates in office. At most the Postmaster-General was a mere bailee, and no question was raised respecting the effect of a bond to secure the performance of his duties. But, whatever may have been the ruling in the case of the *Supervisors of Albany* v. *Dorr*, it is no longer authority, even in the State of New York. *Muzzy, Supervisor*, v. *Shattuck et al.*,† subsequently decided, and affirmed unanimously in the Court of Appeals, is utterly irreconcilable with it, and it has settled the law otherwise in that State. So in Pennsylvania, in *Commonwealth* v. *Comly*,‡ it was ruled that the responsibility of a public receiver depends on his contract, when there is one, and not on the law of bailments. There the condition of the bond was to account and pay over, and it was held no defence by the surety of the receiver that the money was stolen, though it was kept as a prudent man would keep his own funds. It was said by Chief Justice Gibson, in delivering the judgment of the court, after referring to the fact, that a lessee is not relieved from payment of rent by destruction of the demised premises by fire, "A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim for relief, one would think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver, or his surety, would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretences, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case;

* Cowper, 754. † 1 Denio, 233. ‡ 3 Pennsylvania State, 372.

and his discretion, were he at liberty to use it, would be influenced by considerations of general policy." *State* v. *Harper** is to the same effect. This is precisely the ground which this court has taken. In *The United States* v. *Prescott*† it was decided that the felonious taking, stealing, and carrying away the public money in the hands of a receiver of public money, without any fault or negligence on his part, does not discharge him or his sureties, and that it cannot be set up as a defence to an action on his official bond. The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office according to law. But the acts of Congress respecting receivers made it their duty to pay the public money received by them when ordered by the Treasury Department, and that department, by its general orders of 1854, required payment to be made before this suit was brought. No exception was made, no contingency was contemplated. The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in Prescott's case. A similar ruling was made in *United States* v. *Dashiel*.‡ What the condition of the bond on which suit was brought in that case was, does not appear in the report, but it was for the discharge of the paymaster's official duty. The doctrine of Prescott's case was also recognized in *United States* v. *Keehler*,§ and it must be considered as settled law. Applying it to the case now in hand, it makes it clear that the evidence offered by the defendants, tending to prove that the receiver had been robbed of the public money received by him, was rightly rejected as constituting no defence to the suit on the receiver's bond. It is true that in Prescott's case the defence set up was that the money had been

* 6 Ohio State, 607.
† 3 Howard, 578.
‡ 4 Wallace, 182.
§ 9 Id. 83

stolen, while the defence set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it.

There is nothing in the second error assigned. Though under the acts of Congress of August 6th, 1846,* and the amendatory act of March 3d, 1857,† receivers are required to pay when required by the Secretary of the Treasury, there were general orders made for all receivers, requiring payments to be made at stated times, which were in existence when this receiver's bond was given. The declaration avers a request, and this is enough after verdict.

JUDGMENT AFFIRMED.

[See *infra*, p. 56, Bevans, Receiver, *v.* United States.]

UNITED STATES *v.* WORMER.

The United States contracted, during the war to suppress the Rebellion, with a dealer in horses for a large number of cavalry horses; he to be paid on the completion of the contract, should Congress make an appropriation for that purpose. *After* the contract had been made, the government issued instructions which were better calculated to protect it against frauds than previous ones had been; and among the regulations was one that the horses should be placed in the inspection yard twenty-four hours before inspecting them, and another that the person appointed as inspector should brand with the letter R, on the shoulder, all horses "manifestly intended as a fraud on the government, because of incurable disease or any purposely concealed defect." The contractor threw up his contract and claimed damages, which the Court of Claims allowed him, to the extent which it deemed would make him whole.

This court reversed the judgment and ordered a dismissal of the contractor's claim; it holding that the new regulations were not unreasonable.

APPEAL from the Court of Claims.

The claimant demanded $15,000 from the government by way of damages for breach of contract. The principal facts

* 9 Stat. at Large, 59, § 6. † 11 Id. 249.