free and uninterrupted communication between Tennessee and Missouri since the war closed, and the courts everywhere accessible for the prosecution of any cause of action. Besides, in the very nature of things, the complainant must have known soon after it occurred that an improved farm, once occupied by him, was in the possession of adverse claimants. This was notice sufficient to put him on inquiry, and this inquiry would have resulted in ascertaining all the facts stated in the bill. There is no reason given for the delay, nor any facts and circumstances on which any satisfactory excuse can be predicated.

Here, then, is the case of a party engaging in the rebellion without provision for his debts, to which there was no defence, asking a court of equity, after the lapse of many years without sufficient excuse for the delay, to interfere in his behalf because his creditors adopted the wrong methods for the enforcement of their claims against him. And this, too, without any specific charge of fraud, except in the matter of the affidavits on which the proceedings were founded.

Such a charge, under the circumstances, is too weak and unsatisfactory to relieve the complainant from the consequences of his own folly.

In any aspect of the case we think the demurrer was properly sustained, and the decree of the Circuit Court dismissing the bill is therefore

AFFIRMED.

HUMASTON *v.* TELEGRAPH COMPANY.

1. Where a person, on a given contract, covenants to pay a sum whose amount is to be contingent on certain events and is to be ascertained by arbitrators, such person, if he prevent any arbitration, may be sued at law on a *quantum valebat*, and the sum due may be ascertained by a jury under instructions from the court. If the jury, under such instructions, find that only so much is due, the plaintiff can recover nothing more.
2. A contract of a special nature explained and interpreted so as to sustain a charge under which, in a case like that just stated, the jury found as due much less than the plaintiff claimed.

3. Where a person in consideration of property (not money) to be assigned by another, agrees to give a certain number of shares of stock, having on the day of the contract a fixed market value, and, refusing to give the stock, is sued at law for a breach of the contract, evidence of the value of the stock at any other time than at the date of the contract is rightly excluded; its value at that date being agreed on and admitted.

APPEAL from the Circuit Court for the Southern District of New York; the case being thus:

Humaston having invented certain instruments for expediting the transmission and reception of messages by telegraph, and especially for perforating paper for the purpose of such messages, which inventions were patented, and having also, as he alleged, discovered a process by which paper could be chemically prepared, so as to be sensitive to the electric current, and by which its value would be greatly enhanced (a process which he kept secret), entered in April, 1861, along with one Lefferts, who had some interest in the matter with him, into an agreement, as follows, with the American Telegraph Company, a company already established in the business of telegraphing:

"The American Telegraph Company agree to buy, and Humaston agrees to sell a full, perfect, and unincumbered title to all his inventions for all electric telegraph machines and processes, and particularly the patented invention for perforating paper for the purpose of telegraphic messages, and the adaptation and manner of using such perforated paper in the transmission of such messages, including whatever is patented by Humaston in the transmission of messages by telegraph, and also including the secret process of preparing the chemical paper, with the right to procure letters-patent therefor.

"The said Humaston and Lefferts agree not to engage, directly or indirectly, in telegraphing during the period of ten years, in competition with the American Telegraph Company, nor in any way aid, countenance, or encourage any telegraph line doing business in any of the States bordering upon the Atlantic Ocean or Gulf of Mexico, &c., so as to in any way injuriously affect the business or interests of the American Telegraph Company.

"The consideration to be paid by the company for the said

inventions and patents, and agreement against competition, is one dollar, and at least 50 shares of the capital stock of the American Telegraph Company. Upon the execution and delivery by said Humaston of conveyances of the aforesaid inventions and patents, conveying a full, unincumbered, and perfect title to the whole thereof, the said American Telegraph Company are to issue to the said Humaston 100 shares of the stock of said company, *and a further consideration of not exceeding* 400 *shares of the capital stock of said company* is to be paid or issued to the said Humaston upon the following stipulations and conditions: Three disinterested referees or arbiters *are to decide how much (if any) more is to be issued to the said Humaston after such arbiters shall be satisfied as to the capability and value of said patented inventions;* the said referees or arbiters to be mutually selected.

"It being understood that the aforesaid maximum amount of stock consideration is stated under a claim by the said Humaston and Lefferts that his patented inventions will enable the said company to do by the Humaston system, and on one wire, five times as much business, regularly and accurately, as can be done now on one wire, in the same time, by any system now used by said company, it being also understood that compensation is not to be allowed to Humaston for what is now public, but only for what their patented improvements in telegraphy are worth more than any other of said systems.

"The arbiters or referees are also, in estimating the value of said patented inventions, to consider *the comparative reliability, accuracy, rapidity, cost, and also the expense of working and using said inventions with those now in use.* To enable the said Humaston and Lefferts to prove the capacity and value of the said inventions, full, fair, and sufficient trials are to be allowed to them, and made in such manner, and as often, and for such period of time, as the referees may determine, and the final decision is to be given before the expiration of one year from the date hereof. Each party are to have the right to suggest to the referees such experiments for the testing of such inventions as to them may seem proper. The referees to have full opportunity of investigating and deciding in the matter. It is also understood and agreed that the company are to have reasonable opportunity to examine into the validity and patentability of the patented inventions, and place any questions which may

arise thereon before the referees for their decision. But the referees are hereby instructed that under the foregoing paragraph the company are to require only a reasonable amount of evidence as to the validity of the Humaston inventions, and further agreed that, should the referees decide that the invention is wholly invalid, and not patentable, then the company will surrender up and transfer to Humaston, by a good and sufficient assignment, the title to the said patents on the retransfer of 50 shares of stock of the company. Upon the award or decision of said referees, or a majority thereof, being made in writing and delivered to said company, said company are to pay or issue to said Humaston the additional amount, if any, of stock (not exceeding 400 shares), determined or stated in such award."

Humaston made the requisite transfers, and the matter meant to be submitted was referred to the arbitrators. They accepted their office and entered upon the discharge of their duty, but the *telegraph company withdrew its submission.* Humaston now brought special assumpsit against the company, claiming not only the 100 shares of stock which he actually received in 1861 (and then worth $100 a share, or $10,000, and which in 1866 was worth $18,000), but claiming also the value of the other 400 shares. His position was that by the terms of the contract, he was entitled to the 400 shares unless the arbitrators named a smaller compensation, and that as the company had withdrawn its submission, and so prevented the arbitrators from naming any such smaller compensation, he was entitled to the whole 400 shares.

At the trial, the instruments invented by Humaston were submitted to the jury and explained, and experts, mechanics, and telegraphers examined upon them for several days.

After the plaintiff had established what was perhaps a *primâ facie* case, his counsel, for the purpose of furnishing a rule for estimating his damages, offered to show that the market value of the stock of the American Telegraph Company on the 12th day of June, 1866, on which day the company had been consolidated with the Western Union Telegraph Company, was $150. The court excluded the evidence for the purpose for which it was offered, but admitted it as

a fact which the jury might consider in estimating the value of the property sold. Subsequently the parties agreed that the market value of the stock of the company on the 1st day of April, 1861, was $100 per share, and made their agreement known to the court. Thereupon the court held that the evidence as to the value of the stock on the 12th of June, 1866, and at subsequent dates, which had been admitted, was immaterial; and under the plaintiff's exception struck it out and excluded it.

Some of the defendant's evidence tended to show that the plaintiff's invention had no value and had never been used.

The court charged—

That the plaintiff was not entitled, as matter of law, to recover of the defendants the value of the remaining 400 shares:

Also that the plaintiff did not, as matter of law, become entitled to the said 400 shares of stock by reason of the defendants' revocation of the powers of the referees or other breach of contract alleged, but that the plaintiff was entitled, in consequence of the revocation, to bring an action and to recover the excess (if any there was) which the value of what he sold, assigned, and transferred to the defendants (enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the defendants) had when sold and delivered, over the amount which he had already received (and that this the parties agreed was 100 shares, of the aggregate value of $10,000), with interest on such excess from the 13th of February, 1867; but if in their judgment there was no such excess, then that their verdict should be for the defendant.

To these instructions the counsel for the plaintiff excepted.

The jury found for the plaintiff, and assessed his damages at $7500.

The exclusion of the evidence and the charge of the court were the matters now assigned for error.

Messrs. Truman Smith and Cephas Brainard, for the plaintiff in error, argued the case much at length, and showed, as

they conceived, that it was well established both in England and this country, that a stipulation in a contract for a reference of any matter of difference likely or certain to arise thereunder, might be connected with the principal undertaking in such a manner as to make it a *condition*, and that as such it might essentially qualify or affect the rights of one party, or the obligations of the other; that if it were a condition precedent and was not performed, the obligation would be null; and if it were a condition subsequent and not performed (which the counsel alleged was the case here), then that the condition became null and the obligation absolute. If the party bound by a condition precedent did not submit, or offer to submit, or having submitted, revoked, his right of action was gone; and if a party bound by a condition subsequent refused to submit, or having submitted, revoked, then the qualification of his liability was gone, and that liability became absolute.

The learned counsel referred to twenty-nine different cases, English and American, beginning with *Vynior's Case*, reported by Sir Edward Coke,* which sustained, as they conceived, their views.

Messrs. J. R. Porter and G. P. Lowry, contra, citing *Cowper* v. *Andrews*,† and the opinion of Hobart, C.J., therein; *Brewer* v. *Hill*,‡ and other cases.

Mr. Justice DAVIS delivered the opinion of the court.

Whether or not the court erred in its charge, and in the exclusion of the evidence excluded, depends on the proper interpretation of the contract and the rule of damages which shall be applied in this action to the breach of it.

It is insisted by the plaintiff that the defendant promised to pay him for his invention four hundred shares in addition to the one hundred shares paid on the delivery of the title, unless the arbitrators should relieve the company by fixing some less amount, and a great deal of learning touching the

* 8 Reports, 81*b*. † Hobart, 40. ‡ 2 Anstruther, 413.

doctrine of conditions subsequent and precedent has been invoked in support of this position. But this doctrine has no application here, for, manifestly, this is not an undertaking to which a condition subsequent could be attached. It is easy to determine why this contract was made, the nature of it, and the acts to be performed by the contracting parties. The American Telegraph Company were engaged in carrying on the telegraph business in some portions of the country, and naturally desirous of appropriating to itself any new invention which would facilitate the transmission of telegraphic messages. Humaston claimed that his system just patented would do five times as much business on one wire as the ordinary systems then in use. If it could do this with equal accuracy and reliability and at no greater cost, the value of it could be hardly overestimated, but there had been no experiments to test the question of whether or not it was capable of doing these things. It might do the work claimed for it and yet be so unreliable, or the expense of working and using it so much greater than the expense of working and using the inventions then open to the public or used by the company, that its purchase would be dear at any price. The company, desirous of possessing everything new and useful in the line of their business, were willing to risk something in the acquisition of these inventions, but unwilling to pay the estimate of value which Humaston put upon them without trial of their utility. This estimate was $50,000, as the proof on the trial was that the stock of the company stood at par in the market at the date of the contract. The company said to Humaston, We will take your patents, whether valid or not, and pay you $5000 for them if you and Lefferts stipulate not to compete with us for a period of ten years, and if they are valid, whether useful or not, the compensation shall be increased to $10,000. But we cannot promise additional compensation unless, after proper experiment, your system shall be proved to be worth more. It may be that your claim of rapid performance can be sustained, and yet the system, owing to its greater cost than those now in use, or some other controlling practical

consideration, be of comparatively little value to us. This can only be determined, after trial, by some impartial tribunal. We are willing that this tribunal shall be referees mutually selected, to whom shall be submitted the question of whether we shall pay anything more than the $10,000 already paid, after the merits of your system have been tested by them and its capability and value established. They may reach the conclusion that you are sufficiently compensated already, and if they do, their award must be accepted as a final settlement of the matters of difference between us. If they reach a contrary conclusion they must fix the amount of consideration which we are to pay in addition to what you have already received; but this must be within the limit of four hundred shares of stock equivalent to $40,000.

This is a fair analysis of the provisions of the contract and of the considerations on which it was based. Instead of it binding the company to pay four hundred shares, unless a less number was fixed by the arbitrators, it left them to say whether Humaston was entitled to any more than he had already got, and if so, how much. There was no concession by the company that the inventions were worth any more to it than the hundred shares. It might turn out on the trial that the price already paid was excessive, or, on the contrary, that it was not sufficiently remunerative. This point of value the triers were to determine, and if determined favorably to the plaintiff he would have a cause of action against the defendant. Until this determination, if there had been no interruption to the arbitration, no cause of action could arise. It was a reasonable provision that the value of these inventions should be submitted to the arbitration of practical business men, and if Humaston, instead of the company, had refused to proceed with the arbitration he could not resort to an action, for the defendant would not have been in default, and, therefore, not liable to suit.* But the defendant broke the agreement and revoked the

* Delaware and Hudson Canal Co. v. The Pennsylvania Coal Co., 50 New York, 250.

submission, and Humaston asks that in consequence of this wrongful action of the defendant his rights may be determined by the court and jury, instead of by arbitration.

It becomes, therefore, important to determine what is the measure of liability for the breach of contract by the defendant. If we are correct in our interpretation of the contract, this action cannot be supported as an action seeking damages for breach of contract to deliver stock, for there was no engagement to deliver any, except on a condition which has not happened, and there is no proof that the arbitrators would have found that Humaston was entitled to receive more stock than he had already obtained.

The action can be supported for the value of the property, and this was the proper subject of inquiry at the trial. The company covenanted to pay this value, to be ascertained in a particular mode, and as they have prevented this mode being adopted, they cannot take advantage of their own wrong and deprive the plaintiff of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract, the thing on which the submission was based, and the revocation of the submission leaves the jury to settle it. Benjamin, in his Treatise on Sales,* says, if the performance of the condition for a valuation be rendered impossible by the act of the vendee the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in *Clarke* v. *Westrope*,† where the outgoing tenant sold the straw on a farm to the incomer, at a valuation to be made by two indifferent persons, but, pending the valuation, the buyer consumed the straw. And the doctrine of the text is sustained by adjudged cases in this country and England.‡

* First edition, page 430. † 18 Common Bench, 765.

‡ Inchbald *v.* The Western, &c., Plantation Co. (head note), 112 English Common Law (17 Common Bench, New Series), 733; Hall *v.* Conder, 89 Id. (2 Common Bench, New Series), 53; United States *v.* Wilkins, 6 Wheaton, 135, 143; Kenniston *v.* Ham, 9 Foster (N. H.), 506; Holliday *v.* Marshall, 7 Johnson, 213; Cowper *v.* Andrews, Hobart, 40–43.

Opinion of the court.

Nothing is, therefore, due on this contract, unless the court and jury, sitting in the place of the arbitrators, shall decide that the plaintiff is entitled to recover for the sale of his inventions more than he has already received. The case was tried on this theory, and the court charged the jury that the value of a specified amount of stock was not the legal measure of the plaintiff's damages, but that he was entitled to recover the excess (if any there was) which the value of what he sold and transferred to the company, enhanced by the agreement of the plaintiff and Lefferts not to enter into competition with the company, as stipulated in the contract, had, when sold and delivered, over the amount which he had already received; and this the parties agreed was one hundred shares of the defendant's stock, of the aggregate value of $10,000, with interest on such excess from the date of the revocation of the powers of the arbiters. This charge is in conformity with the views we have expressed of the obligations of this contract, and of the rule of damages applicable to the breach of it.

It is urged, however, that the court erred in excluding testimony of the value of the defendant's stock both when they sold out to the Western Union Company, and when the revocation occurred.

It is not perceived how the sale to the Western Union Company changed the rights of the parties, for there is nothing to show that it hindered the defendants from acquiring in the market at any time a sufficient number of shares of its stock to comply with the award which it was expected the arbitrators would be suffered to make long after this sale took place.

If there had been an agreement to deliver a certain quantity of stock, and an action had been brought for the conversion of it, on the ground that the defendant by the sale to another company had put it out of its power to comply with the terms of its agreement, evidence of the value of the stock at the time the sale occurred would be competent. And so would evidence of its value at the date of the revo-

cation, if the plaintiff was in a position to support an action for damages for breach of contract to deliver stock. But as he is limited in his recovery to the value of his inventions when sold and delivered, evidence of the value of shares of stock at all is only proper as tending to show the estimate put upon the property by the parties at the time they made their bargain. And as the value of the stock in 1861, when the contract was concluded, was directly shown, its value at any other time became unimportant. The Circuit Court proceeded on the theory, and we think correctly, that the defendant intended to give for and considered the plaintiff's property worth (if it performed certain conditions) the cash equivalent of five hundred shares of stock. This was $50,000, which the plaintiff must also have adopted as his estimate of the value of the property when he sold it, as he offered evidence tending to show that it was worth that sum, and claimed that the evidence proved the fact. The conflict of testimony on the worth of the Humaston inventions was very great, for the defendant also introduced evidence tending to prove, and claimed it was proved, that these inventions were of no value, or if any, no more than the amount already paid for them.

In this condition of the evidence it was a difficult matter for the jury to settle the issue submitted to them, but as they were able to do it with the aid of the court and eminent counsel, after a lengthy trial, by finding a considerable verdict for the plaintiff, it would seem that he ought to be satisfied with it.

At any rate there is no error in the record, and the judgment must be

AFFIRMED.