

commissioners. It is well settled that there can be no set-off except where the debts are mutual, and that they are not mutual unless the demand be due the party in his own right, or unless the parties stand in the same relation to each other. *Harris v. Taylor*, 53 Conn. 500, 2 Atl. 749; *Olmstead v. Scutt*, 55 Conn. 125, 10 Atl. 519. This distinction, and its application to the statute of limitations, is recognized in the case of *U. S. v. Clark*, 96 U. S. 37, cited by plaintiff, where the court says, at page 43:

"We think it is a principle of general application that, so long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defense to that action be protected from the bar of the lapse of time, provided it is not a cross demand, in the nature of an independent cause of action."

Second. The plaintiff further claims that this suit is not barred, because it was brought within four years after the right accrued; it being claimed that the right of action was granted by the act of March 3, 1837 (24 Stat. 505). This statute provides that no suit against the government shall be allowed, unless the same shall have been brought within six years after the right accrued for which the claim is made. The second section of the act simply gives this court concurrent jurisdiction with the court of claims. But prior to the passage of said act there was nothing to prevent the decedent from presenting his claim for services, if he had any, to said court of claims, as soon as the services were rendered. Rev. St. § 1059. It would seem, therefore, that it would be barred in either court. *Cross v. U. S.*, 4 Ct. Cl. 271. Furthermore, the construction contended for by plaintiff would make the statute operate to revive all claims arising since the adoption of the constitution of the United States. This is clearly not the intent of the statute.

It appears from the complete statement, now submitted by the government, that the sum of \$406.02 had been paid the late marshal by the United States, upon the account, which payment was not known to the parties at the former trial, but is now admitted. Deducting this item, together with the \$108.17 above stated, from the amount of the former judgment, and the balance would be \$579.29. The items of jury commissioner fees now allowed, to-wit, \$270, blanks, \$21.40, and per diems, \$20, added to the above balance, amount to \$890.69, for which sum judgment may be entered in favor of the plaintiff.

DEVERE v. DELAWARE, L. & W. R. CO.
(Circuit Court, D. New Jersey. March 27, 1894.)

FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Section 88 of the New Jersey corporation act authorizes service to be made upon foreign corporations by serving any "officer, director, agent, clerk, or engineer" thereof. *Held*, that the word "engineer" includes a railroad locomotive driver.

This is an action by one Devere against the Delaware, Lackawanna & Western Railroad Company. Heard on motion to quash the writ of summons for irregular service.

Wm. D. Tyndall, for plaintiff.
Bedle, McGee & Bedle, for defendant.

GREEN, District Judge. The writ of summons in this case was served by the marshal upon John English, an engineer in the employment of the defendant company, a foreign corporation. The service was made under section 88 of the corporation act of this state. That section provides that:

"In all personal suits or actions hereafter brought in any court of this state against any foreign corporation or body corporate, not holding its charter under the laws of this state, process may be served upon any officer, director, agent, clerk or engineer of such corporation or body corporate either personally or by leaving a copy thereof at the dwelling house or usual place of abode of such officer, director, agent, clerk or engineer, or by leaving a true copy of such process at the office, depot or usual place of business of such foreign corporation or body corporate. And such service shall be good and valid to all intents and purposes."

It is contended on the part of the defendant that the word "engineer," as used in this section, does not include "engineers in charge of locomotives," or "engine drivers," but is confined to those persons who are skilled in the principles and practice of the art of "engineering;" that is, the planning and constructing of roads, bridges, railroads, canals, aqueducts, machinery, and other similar works. The argument is that it was the intention of the legislature to direct service of process against a foreign corporation to be made upon some one who was directly interested in the management or operation of the company, and not upon a mere employé, whose duty would not include that of notifying the company of service upon him of civil process. This argument is undoubtedly very persuasive, but I cannot assent to its conclusiveness. The word "engineer," as used in this act, must be given its usual and commonplace meaning. It is defined in the "Century Dictionary" as "an engine driver; one who manages an engine; a person who has charge of an engine and its connected machinery." This definition is quite broad enough to include the employé of the defendant corporation upon whom process was served in the present suit. He was admittedly in charge of and was managing a "locomotive engine" of the defendant, and was one of its "engineers." Clearly, he was of that class of employés of a foreign corporation upon whom service of process against the corporation could be made under the act in question. An argument in favor of this construction of the act could be founded, perhaps, upon the sequence of the persons liable to service of process as stated in the act itself. Such service should be made, if possible, at first upon an "officer" of the corporation representing the "executive department;" secondly, upon a "director," representing the "management;" thirdly, upon an "agent," representing fairly the "business department;" fourthly, upon a "clerk;" and, lastly, upon an "engineer,"—together representing the body of employés. It will be noticed that there seems to be a sliding scale, so far as the power, responsibility, and duties of the person selected for service of process are concerned. If this be true in fact, it would seem that an "en-

gineer," who, it is insisted by the counsel for defendant, must be an "officer," as intended by the act in question, and not simply an employé, would have been placed before a mere "clerk" in the list. The motion to quash is refused.

SLEEPER et al. v. WOOD et al.

(Circuit Court of Appeals, First Circuit. March 27, 1894.)

No. 26.

SALE—WARRANTY—EVIDENCE—CUSTOM.

In March, 1888, certain packers of corn sold 2,000 cases "best packing of 1888 corn," with "usual guaranty against swells." The evidence showed conclusively that "swells," as used in the trade, included all cans whose contents were sour; that the "usual guaranty" was until July 1st of the following year; and that it was customary before that time to notify the seller of the number of spoiled cans, and return the goods. The evidence failed to show that the words "best packing of 1888" had any definite meaning in the trade. *Held*, that these words carried no implied warranty of quality, and that in the absence of any notice or return of the spoiled goods, according to the conditions of the warranty against swells, there could be no recovery for the spoiled corn.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Solomon S. Sleeper and others against William B. Wood and others to recover damages for breach of warranty in the sale of certain canned corn. The court below directed a verdict for defendants, and to review the judgment entered thereon plaintiffs sued out this writ of error.

William B. French and Heman W. Chaplin, for plaintiffs in error.
Myers & Warner and George E. Bird, for defendants in error.

Before COLT, Circuit Judge, and CARPENTER and ALDRICH, District Judges.

CARPENTER, District Judge. The questions arising in this case will appear from the following extract from the bill of exceptions:

This is an action of contract to recover for breach of warranties of quality of 2,000 cases of canned corn sold by the defendants to the plaintiffs. * * * There was evidence tending to show the following facts: The plaintiffs, partners under the firm name of S. S. Sleeper & Co., are wholesale grocers, having their usual place of business in Boston. The defendants are manufacturers and packers of canned corn, residing in Portland, but having a factory or canning establishment at Cumberland, in the state of Maine. The defendants had, before the sale, employed F. Robbins & Co., merchandise brokers, of Boston, to sell canned corn for them, including the corn in question. The contract for the sale of the corn was made between the brokers, F. Robbins & Co., representing the defendants, and the plaintiffs. Immediately after the sale, the defendants wrote and forwarded to the brokers, who delivered to the plaintiffs, the sold note, of which the following is a copy:

"Portland, Me., March 15, 1888.

"Sold Messrs. S. S. Sleeper & Co., Boston, 2,000 c., 4,000 doz., best packing of 1888 corn, at \$1.20 per doz., less 1½% dis. for cash, if paid within ten days from shipment, or sixty days accep., tins to be lacquered or left bright as