doctrine of estoppel rarely arises, because seldom needed. The act of dedication of homestead or mortgage out of such lands settles the rights of parties, without going further. But where, in such cases, there have been solemn declarations by the husband and wife that the land so mortgaged is not their homestead, and such declarations are not contradicted by open and notorious use of the land in connection with the home for the comfort and convenience of the family, and have been relied on and acted on by the mortgagee, and were made to induce the mortgage, there would be an estoppel if invoked. Haswell v. Forbes (Tex. Civ. App.) 27 S. W. 567. Again, where the use of the rural homestead by the family as a home, in whole or in part, is not obvious and apparent, and the husband and wife join in a declaration that such whole or part of the home is not their homestead, or any part thereof, but that other lands constitute their home, and such declarations are made to procure a mortgage, and are believed and relied on by the mortgagee, without neglect or other knowledge on his part, and money loaned by him on such whole or part of the homestead, the husband and wife will be estopped. Mortgage Co. v. Norton, 71 Tex. 683, 10 S. W. 301. The doctrine of Loan Co. v. Blalock, 76 Tex. 86, 13 S. W. 12, has taken deep root in this state. Without it the money lender can easily enter the home, and eject the wife and children. We find that the respondents, Burford and wife, were not estopped by their declarations in this case from claiming their actual homestead on which they lived; that their possession and use of the home on this 120 acres was open and obvious. Let judgment be entered for complainant for its debt of $14,000 and interest, and for the three coupon notes, of $1,400 each, and interest, and for attorney's fees and costs. Let its mortgage lien be foreclosed on all the land described in the trust deed except the 120 acres first purchased of the H. H. Edwards survey, upon which the home is situated, and for that 120 acres let a decree be entered for respondents, Burford and wife.

UNITED STATES v. CERTAIN TRACT OF LAND IN CUMBERLAND TOWNSHIP, ADAMS COUNTY, PA. (two cases).

(Circuit Court, E. D. Pennsylvania. April 22, 1895.)

Nos. 34 and 64.

EMINENT DOMAIN—RIGHT OF, IN UNITED STATES GOVERNMENT—PUBLIC USE—WHAT IS—NATIONAL CEMETERY AT GETTYSBURG.

The act of congress approved March 3, 1893, appropriating money for the purchase of land at Gettysburg, Pa., for the purpose of preserving the lines of battle there, and of marking the leading tactical positions of the battlefield with tablets, and for opening avenues, etc., does not indicate such a public use under the constitution as to justify condemnation proceedings under the subsequent act of June 5, 1894. Butler, District Judge, dissenting.

These cases arose from the filing of two separate petitions of Ellery P. Ingham, Esq., United States district attorney for the Eastern District of Pennsylvania, praying the court to appoint

two juries to estimate and determine the value of the estates and interests of all parties concerned in two certain tracts of land situate in Cumberland township, Adams county, Pa., more particularly described by metes and bounds in the said petitions, which tracts were said to be owned by the "Gettysburg Electric Railroad Company."

The petitions, after reciting the act of congress conferring jurisdiction upon the department of justice in land condemnation proceedings, and the act of assembly of Pennsylvania of June 8, 1874, providing a method of vesting the title to lands in that state in the United States when no agreement of purchase could be made with the owners thereof, recited that by an act of congress approved on the 3d day of March, A. D. 1893, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1894, and for other purposes," it is provided, inter alia, as follows: "Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the secretary of war." (4) That by a joint resolution of congress, approved June 5, 1894, entitled "Joint resolution, authorizing the purchase or condemnation of land in the vicinity of Gettysburg, Pennsylvania," it is provided as follows: "Whereas, congress appropriated by the act of March third, eighteen hundred and ninety-three, the sum of twenty-five thousand dollars to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia, on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading tactical positions of both armies; and whereas, an appropriation for the further sum of fifty thousand dollars is now under consideration by congress for like purposes which has passed the house of representatives during the present session and is now pending in the senate; and whereas, it has been recently decided by the United States court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the war department to execute the purposes declared in the act aforesaid; and whereas, there is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March third, eighteen hundred and ninety-three: Therefore, be it resolved, by the senate and house of representatives of the United States of America in congress assembled, that the secretary of war is authorized to acquire by purchase (or by condemnation) pursuant to, the act of August first, eighteen hundred and eighty-eight, such lands or interest in lands, upon or in the vicinity of said battlefield as, in the judgment of the secretary of war, may be necessary for the complete execution of the act of March third, eighteen hundred and ninety-three: provided, that no obligation or liability upon the part of the government shall be incurred under this resolution nor any expenditure made except out of the appropriations already made and to be made during the present session of this congress." (5) That in order to carry out the purposes of the aforesaid act of March 3, 1893, it is necessary that the United States acquire title in fee simple to the said tracts of land. That the said tracts include many important tactical positions occupied by many different commands and bodies of troops while engaged in the battle of Gettysburg, at some of its most critical periods. That if title to the said tract be not vested in the

United States it will be impossible to carry out effectually upon this part of the battlefield the purposes expressed in the said act of congress, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets." That no agreement can be made with the owners of the said tracts for the purchase thereof.

The jury of view in the first case subsequently filed a report assessing damages for the taking of the property; and on March 26, 1895, the Gettysburg Electric Railroad Company filed exceptions thereto, alleging, in substance, that the purposes specified in the petition were not public uses or purposes, authorizing the condemnation by the United States of private property. In the second case a motion to quash the petition was filed upon substantially the same reasons. The two matters were argued at the same time.

Ellery P. Ingham, for plaintiff.
Thomas Hart, Jr., and Chas. Heebner, for defendant.

DALLAS, Circuit Judge. The right of the United States to take private property for public use, upon making just compensation, though questioned in Pollard's Lessee v. Hagan, 3 How. 212, is now fully recognized; but that this right cannot be exercised, within the limits of the several states, for any purpose which is not incident to some power delegated to the general government, and necessary, or at least adapted, to its execution, is equally well settled. 1 Hare, Const. Law, p. 346; Kohl v. U. S., 91 U. S. 367; U. S. v. Fox, 94 U. S. 315; Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670; Cherokee Nation v. Southern Kan. Ry. Co., 135 U. S. 641, 656, 10 Sup. Ct. 965.

The end sought to be promoted in the present instance highly commends itself to patriotic sentiment and strongly appeals to the generous impulses of all who justly esteem the services of those by whom the great battle of Gettysburg was fought and won; but such feelings may not be indulged in a place where justice is judicially administered without respect to persons, and where the constitution of the United States must be regarded as imperatively prescribing the paramount rule of civil conduct as well for the government as for the people. Therefore, the only question is whether the object to the furtherance of which these petitions are directed is germane to the execution of any power vested in the general government; and upon this question I have reached a conclusion which to me seems irresistible. The powers of congress are distinctly enumerated in the constitution, and in that enumeration none is included to which the uses for which it is proposed to condemn this land can be related, without, in my opinion, enlarging the constitutional grant by grafting upon its express terms a construction so lax and comprehensive as to be subversive of its limited character. The learned district attorney has referred to but a single clause (article 1, § 8, cl. 1) as conferring the authority now claimed, and that clause is wholly irrelevant. The "power to lay and collect taxes * * * to pay the debts and provide for the common defense and general welfare of the United States" is quite distinct

from the right to take private property for public use; and it is not the power of taxation, but the right of eminent domain, which is here asserted. Government may, in time of war, appropriate or destroy private property. This is justified by "the necessities of war." U. S. v. Pacific R. R., 120 U. S. 234, 7 Sup. Ct. 490. But no deduction from this doctrine of the public law can be made and applied in time of peace, be the incentive what it may, without violation of "the supreme law of the land."

Entertaining these views, with which no judicial decision that has been brought to my notice conflicts, it is impossible for me to sustain these proceedings. In the first case the exceptions to which this opinion is applicable are sustained. In the second case the motion to quash is granted.

BUTLER, District Judge (dissenting). I regret that I cannot unite in the above conclusion. I do not propose to enter upon an argument to sustain my views, but to state very briefly the reasons on which they are founded.

While the government may take land for public use, the use must be such as arises out of the exercise of its legitimate functions. It is not necessary, however, that the land or the use be indispensable. It is sufficient if it be convenient and serviceable. Within this limitation congress and the executive cannot be controlled; they are the judges. The courts can only interfere where the limit is transcended. The constitution does not define the special uses for which land may be taken; they could not be so defined; the occasion for them changes with the change of circumstances. As for instance, the government has the care and wardship of the Indian tribes. It must provide for them, protect its citizens against them, and keep the public peace in this respect. Of recent times it has come to be believed that this duty can best be discharged by teaching them the arts and industries of civilized life. The government has adopted this view, and consequently established schools for the purpose. Schoolhouses have thus become necessary. In some instances government buildings have been appropriated to this use, and in others buildings have been rented. That land may be taken for the erection of such schoolhouses I cannot doubt.

That land may be taken for customhouses, courthouses, post offices, etc., is not now questioned, though it was formerly denied. Here the use is virtually indispensable. If however, it were a convenience merely, which facilitated the discharge of the government's duties, the right to take would be equally clear.

It is the duty of the government to raise and maintain armies, and to fight battles when necessary. As a consequence, it is necessary to establish military schools, barracks, hospitals, etc. That land may be taken for these purposes is plain. It is absolutely necessary to a discharge of the duty. The right to take, however, is just as clear in the absence of such necessity, when the use aids the government in this respect. If the construction of a railroad between the capital and the seaboard, or any other point where none exists, should become a military necessity or a useful con-

venience in the discharge of these duties, by facilitating the transportation of troops or munitions of war, the government might take land and construct it—without seeking for authority in any other constitutional provision. The power to raise and maintain armies imposes the duty of caring for its soldiers, promoting their welfare during life, and providing for decent burial (at least) after death—whether they die in battle or in time of peace. It may, therefore, do whatever is necessary to these ends. Consequently it may establish hospitals, take land for cemeteries, etc. It could not leave its dead to fester where they fall. To do so would not only outrage public decency, but would raise a serious obstacle to the discharge of its express duty—the maintenance of armies—by inclining men to avoid its service. It may erect monuments to commemorate special acts of heroism, and award pensions for meritorious services; because these and similar acts, directly and materially tend to aid it in discharging the duty stated.

The land described in the petition is adjacent to the Gettysburg National Cemetery. I cannot doubt that it might have been taken to enlarge and improve that property. How much is necessary to that purpose congress and the executive are the judges of. This however is not the purpose named in the statute.

The land is required to carry out the provisions of the act of 1893, to wit:

"For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend."

In my judgment this is a legitimate public use of the land. The battle was a great lesson in military science, the greatest ever taught on this continent, at least—a most important illustration in strategy, and the art of war. That it may be fully understood and appreciated hereafter, it is necessary to do just what is proposed—preserve the battle field in its original condition, mark the positions and movements of the troops, and the different arms of the service, at the various stages of the battle; so that it may be seen, as upon a great chart, precisely how the battle was fought. The government proposes to perpetuate and secure this lesson for the sake of what it may teach to those who at present constitute its armies, as well as to those who will hereafter constitute them. In my judgment this is a legitimate purpose; and it can only be accomplished by taking the land. The power to take it is, I believe, embraced in the power to maintain armies and teach them military science.

I understand the very able counsel who opposes the proceeding to say that the government should own the land, but should obtain it by purchase. If the government should own the land, it is because the government has a legitimate use for it; otherwise it has

no power to purchase, or even to accept it as a gift, and expend money for its improvement. By what authority can the government take and hold land in trust for such purposes, unless they serve a legitimate public use, and especially expend money upon them? A concession that it may purchase, or accept the land as a donation, for the uses stated, seems to me to be a plain concession of the right to take. The government has repeatedly accepted and improved lands for such uses; and the propriety of it has not even been questioned. It so accepted and improved the lands embraced in the Gettysburg National Cemetery and in the Chickamauga and Chattanooga National Park, expending large sums of money on each.

Furthermore this battle field is of transcendent national interest. The ground is hallowed and made sacred by the blood shed upon it, at the most important epoch in the nation's history—in the supreme hour of its life. All right-minded men would say, I think, that it is fitting the nation should own and preserve it from desecration. It may be replied that this is mere sentiment. I think, however, it is something more. But if it is not, it is a most healthy sentiment, the encouragement of which directly tends to preserve the nation, and thus to aid the government in discharging its highest duty. It may be said the same reasons require the ownership of all other important battle fields of the nation; I think not. If they do, however, the government should own them, for the sake of what they teach, and the love of country which they inspire. I believe the other objections urged against the proceeding, as well as the exceptions to the report of the jury, should also be dismissed.

CONSOLIDATION NAT. BANK OF PHILADELPHIA v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. April 23, 1895.)

No. 40.

PENAL BONDS—CONSTRUCTION—SURETYSHIP FOR EMPLOYE.

A bond of suretyship for an employé of a bank was conditioned for the reimbursement of any loss sustained "by reason of fraud or dishonesty" in connection with his duties. It further provided that any claim made under the bond "shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of discovery of the act or default upon which such claim is based." *Held*, that the bond covered not only embezzlements made during the year preceding their discovery, but also earlier embezzlements, which would have been discovered within a year from the time they were committed, but for the fact that such discovery was prevented by the act of the employé in falsifying the books during the year preceding the actual discovery.

Rule for a New Trial.

This was an action founded upon two certain bonds executed and delivered by the defendant, the Fidelity & Casualty Company of New York, to the plaintiff, the Consolidation National Bank, of the city of Philadelphia, wherein and whereby, in the first bond, the said

defendant agreed to make good and reimburse to the said plaintiff (at the expiration of three months after proof of loss) such pecuniary loss to the extent of $10,000 as should be sustained by said plaintiff by reason of the fraud or dishonesty of one Theodore F. Baker in connection with his duties as general assistant and clerk while in the service of the plaintiff for the year ending September 3, 1888, at 12 o'clock noon, renewed by agreement to the same day and hour of 1889; and in the second bond, dated September 30, 1889, wherein and whereby the defendant agreed to make good and reimburse to the plaintiff, as before, such pecuniary loss to the extent of $14,000 as should be sustained by said plaintiff by reason of the fraud or dishonesty of the said Baker in connection with his duties as paying teller while in the service of the plaintiff during the year ending September 30, 1890, at noon. The second bond was renewed from year to year, the last renewal being to cover the yearly term ending September 3, 1894. The plaintiff claimed to have lost, through the fraud of said Baker, between September 3, 1887, and September 3, 1889, the sum of $2,300, and between the 30th day of September, 1889, and January 9, 1894, the sum of $14,100. The discovery of the dishonesty of said Baker was first made by the plaintiff on January 9, 1894, and the plaintiff claimed that it was impossible to state with accuracy the details of the fraud, as, by virtue of his positions in the bank, the said Baker was enabled to embezzle moneys which were intrusted to him, and he did embezzle them to the amount averred. By false entries and otherwise he concealed the facts and the dates of his embezzlement.

The conditions of the policy essential to the understanding of the case are as follows:

The defendant agreed to make good and reimburse to the plaintiff "to the extent of the sum of fourteen thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, * * * which has been committed during the continuance of the said term, or within any renewal thereof, and discovered during said continuance, or within six months thereafter, and within six months from the death, dismissal, or retirement of the employed." "Any willful misstatement or suppression of fact by the employer in any statement or declaration to the company concerning the employed, or in any claim made under this bond, or a removal thereof, renders this bond void from the beginning." "Any claim made under this bond, or a renewal thereof, shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of discovery of the act or default upon which such claim is based."

The evidence at the trial showed that Baker's misconduct was disclosed on January 10, 1894 (not 9th, as averred in the statement of the plaintiff), when the last renewal had been running 3 months and 10 days only.

The court charged the jury partly as follows:

["The plaintiff is entitled, therefore, to recover its pecuniary loss resulting from this misconduct during the preceding twelve months; that is, it is entitled to recover its pecuniary loss resulting from his misconduct during one year prior to January 10, 1894. This period carries you back to January 10, 1893. The misconduct consisted of embezzling money and in the falsification of books and balance sheets. The embezzlement within the period amounted to $5,000. This sum, with interest, the plaintiff is entitled to re-

cover, if the bond and renewals are sustained, together with such other pecuniary loss, if any, as resulted from Baker's falsification of books and balance sheets within that period. If this latter misconduct prevented the discovery of previous embezzlements, and thus prevented the recovery on this account from the defendant of money which it would otherwise have recovered, the plaintiff is entitled to recover the loss thus sustained during a period of twelve months preceding the time when such embezzlements would have been discovered but for this concealment. In other words, if the evidence satisfies you that the plaintiff would have discovered Baker's misconduct before January 10, 1894, but for the falsification of books and balance sheets, and would, consequently, have been able to hold the defendant responsible for embezzlements made during the twelve months immediately preceding this discovery, you should find against the defendant for this pecuniary loss (in addition to the $5,000)—that is, the amount of embezzlement preceding the time when the embezzlements would have been discovered during the last year, but for the falsification of books and balance sheets. Thus, you see, your inquiry may, and probably will, extend over a period of two years prior to January, 1894. * * * What is the pecuniary loss resulting from his misconduct during that year (ending January 10, 1894)? Clearly it is the amount of embezzlements made during the year (conceded to be $5,000), and also such other loss as may have resulted from his falsification of books, etc., during that period."]

On April 8, 1895, the jury rendered a verdict in favor of the plaintiff of $9,675, whence this rule was taken by defendant, alleging, inter alia, that the court erred in the construction of the bond, and in instructing the jury that they could go back for two years, there being no evidence of any embezzlements within the terms of the bond except those within one year.

George R. Van Dusen and John G. Johnson, for plaintiff.
White, White & McCullen, for defendant.

BUTLER, District Judge. Under the court's construction of the contract the question arose, what embezzlements, if any, occurred within 12 months of the time at which such embezzlements might have been discovered, (during Baker's last year in the bank), but for his misconduct in altering books or falsifying balance sheets? This question was submitted to the jury. The court was not asked to withhold it—on the ground that there was no testimony to justify its submission. It could not however have been withheld if a request to do so had been made, because there was evidence on which something might be found within the period. The defendant admits that a finding of $1,000, would be justifiable. Complaint is made, however, that upwards of $2,000, additional, was found. In submitting the question the jury was reminded that the plaintiff had the burden of proving the amount taken during this time, and that no more could be found than is distinctly proved. The court was misled, by a paper handed up, respecting the period (embraced in the 12 months alluded to) within which the amount claimed was supposed to have been taken; and consequently the jury was instructed that it covered the whole of January, 1892—thus including 10 days back of the 12 months stated. This was an error however against the plaintiff.

A careful examination of the evidence has not satisfied me that the jury found a larger amount of embezzlement during the period in

question, than is justifiable. I think it might have found from the evidence that Baker's misconduct about January, 1893, prevented the plaintiff discovering at that time, the amount with which the plaintiff is charged, as having taken during the period referred to. It is not a question whether the court would so find, but whether the jury might.

The rule is dismissed.

McCULLOCH v. CHATFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 528.

EQUITY—SHARING CONTRACT IN PROCEEDS OF LAND.

A. and C., and two others, entered into an agreement for a speculation in land, which was to be purchased in the name of C., and by him sold for the common benefit. A. was to receive a three-tenths interest in the proceeds, in consideration of certain services, and the others, each, a one-tenth interest, in consideration of the contribution by each of $10,000. Subsequently A. made an agreement with complainant, who paid $5,000 for an interest, and, a difference having arisen between them, a compromise agreement was made between complainant and A. by which it was agreed that complainant's interest should be three-fortieths of the proceeds of the land. Complainant brought suit against all the parties to compel C. to give him a written recognition of his three-fortieths interest in the land, and to have his interest in the land, to that extent, decreed by the court. C. admitted complainant's claim to a one-twentieth interest in the proceeds of the land, but alleged that he had no knowledge whether he was entitled to a greater interest, as that depended on an agreement between complainant and A. *Held*,—First, that the trust agreement was of such nature that it gave complainant no interest in the land, but only an interest in the proceeds of sale when sold; second, that, as the trustee was not shown to be insolvent, and as it did not appear that he had been negligent or inefficient in the discharge of his duties, and as the beneficiaries were largely indebted to the trustee for advances which were a first lien on the land, a court of equity would not, for the present at least, decree that the complainant had a specific interest in the land to the extent claimed, or any other extent, as it might embarrass the trustee in disposing of the property pursuant to the terms of the trust.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

The case presented by the appellant, John McCulloch, who was also the plaintiff in the circuit court, is as follows: By an original and amended bill of complaint which was filed by him against the appellees in the circuit court of the United States for the Eastern district of Arkansas, the plaintiff charged, in substance, that in February, 1882, the appellees, H. R. Allen, William Woods, T. B. Handy, and William H. Chatfield (who has since died, and who is represented in this suit by his successor in interest, A. H. Chatfield) entered into an agreement among themselves with a view of acquiring a large body of land in the state of Arkansas, which then belonged to the Memphis & St. Louis Railroad Company; that, by the terms of said agreement, William H. Chatfield was to become trustee of all of said parties, and others who might become associated with them, to hold and dispose of the land when it was acquired; that said Chatfield, Handy, and Woods were each to have a one-tenth interest in the proceeds of said lands on contributing each $10,000 towards the acquisition of the same; that said Allen was to have a three-tenths interest therein for his trouble and expense in looking up the lands,