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

power to foreclose a mortgage of a vessel by a sale, or to transfer the possession to the mortgagee, (17 Howard, 399, Bogart *v.* The Steamboat John Jay,) they may entertain an application by the mortgagee, after a sale, to be paid out of the proceeds of the sale in the registry of the court. (Propeller Monticello, 17 Howard, 152; Admiralty rule, 43.)

Mr. Benedict's point was this:

This is really a suit to foreclose *a mortgage*, even if it were an original suit against the *ship*. As a suit against the proceeds, it is in substance a suit in equity, for relief against a regular degree in admiralty. In either case, the District Court had no jurisdiction. (Case of the John Jay, 17 Howard, 399.)

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

Between sixty and seventy libels had been filed in the District Court by material men—men who had furnished supplies; also, by shippers of goods and passengers—against the ship Angelique, of which S. W. Jones was master. These several proceedings were commenced in July and August, 1853, and interlocutory decrees, condemning the vessel, were entered in all of them, and final decrees in some six or seven. One of the parties obtaining a final decree issued execution, and the vessel was sold, and the proceeds brought into court. The vessel sold for $6,900.

In this stage of these proceedings, the present appellants filed their libel against the proceeds of the ship in court, setting forth, that, being the owners of the vessel, they sold and delivered her to one A. Pellitier, for the sum of $15,000, on the 7th May, 1853; that of this sum a promissory note of the vendee was given for $5,000, payable in six months, which was secured by a mortgage upon a moiety of the vessel to the vendors, which was duly recorded, in pursuance of the act of Congress, on the 9th May, 1853, in the office of the collector of customs of the port of New York, where the vessel was then registered, and a copy of the mortgage was also filed in the office of the register of deeds of the city and county of New York.

The libel prayed process against a moiety of the proceeds of the vessel in court, claiming the same under, and by virtue of, the mortgage.

Several of the libellants, who had obtained either final or interlocutory decrees, above referred to, appeared, and put in

answers to this libel of the mortgagees, setting up their proceedings, and the decrees condemning the vessel to pay their respective claims to the proceeds, in defence.

The case went to a hearing, when the District Court decreed to dismiss the libel. On an appeal, the Circuit Court affirmed the decree.

The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of the John Jay, heretofore decided by this court. (17 How., 399.)

The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered; or, on the sale of the vessel, and the proceeds brought into the registry, they might have applied by petition, claiming an interest in the fund; and if no better right to it were shown than that under the mortgage, it would have been competent for the court to have appropriated it to the satisfaction of the claim. As the fund is in the custody of the admiralty, the application must necessarily be made to that court by any person setting up an interest in it. This application by petition is frequently entertained for proceeds in the registry, in cases where a suit in the admiralty would be wholly inadmissible. The decree of the court below is therefore right, and should be affirmed.

THE NEW YORK AND VIRGINIA STEAMSHIP COMPANY, OWNERS OF THE STEAMER ROANOKE, APPELLANTS, *v.* EZRA CALDERWOOD, THOMAS C. BARTLETT, DEXTER CARLETON, JOSHUA NORWOOD, PHILANDER CARLETON, ENOS COOPER, AND SETH COOPER, LIBELLANTS.

Neither rain, nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse a steamer for coming in collision with a barge or sailing vessel, where the barge or sailing vessel is at anchor or sailing in a thoroughfare, but out of the usual track of the steam vessel.

Therefore, where a collision took place between a steamer and a sailing vessel, the latter being out of the ship channel, and near an edge of shoals, the steamer must be responsible.

The sailing vessel had no pilot, and did not exhibit an efficient light. Although these circumstances did not exonerate the steamer, yet they make it necessary for this court to say that an obligation rests upon all vessels found in the avenues of commerce, to employ active diligence to avoid collisions, and that no inference can be drawn from the fact, that a vessel is not condemned for an omission of certain precautionary measures in one case, that another vessel will be excused, under other circumstances, for omissions of the same description.