purpose of deepening the channel. Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083, Ann. Cas. 1915A, 232. It is only this right to use and improve for purposes of navigation that the government claims here, a right which the government undoubtedly possessed, if the land in question had been a part of the bed of the de jure stream, as was supposed.

[2, 3] If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded "upon any contract, express or implied"; and a remedy for claims sounding in tort is expressly denied. Bigby v. United States, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519; Hijo v. United States, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994. As stated in United States v. Lynah, 188 U. S. 445, 462, 465, 23 Sup. Ct. 349, 354 (47 L. Ed. 539):

*130 "The law will imply a promise to make the required compensation, where property to which the government asserts no title, *is taken, pursuant to an act of Congress, as private property to be applied for public uses."

Or in other words:

"Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff.

[4-7] Second. The answer, specifically denying that the United States has taken plaintiff's land, excavated a channel through it, and claims possession thereof under the resolution of the Illinois Assembly or otherwise, asserts that in 1909 it did "excavate a channel in the Chicago river in the center of the stream and now claims possession thereof for the purpose of making more navigable the North branch." The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the government is well founded. The mere fact that the government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land, which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. Hill v. United States, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862, which both in its pleadings and its facts bears a strong resem- *131 *blance to the case at bar, is conclusive on this point. See, also, Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108. The case at bar is entirely unlike both the Lynah Case and the Cress Case. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See Cramp & Sons v. Curtis Turbine Co., 246 U. S. 28, 40, 41, 38 Sup. Ct. 271, 62 L. Ed. 560.

The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction.

Judgment reversed and case remanded to the District Court, with directions to dismiss it for want of jurisdiction.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

(248 U. S. 132)

UNITED STATES v. SPEARIN.
SPEARIN v. UNITED STATES.

(Argued Nov. 14 and 15, 1918. Decided Dec. 9, 1918.)

Nos. 44, 45.

1. CONTRACTS ⟸232(1)—UNFORESEEN DIFFICULTIES.
Where one agrees to do for a fixed sum a thing possible to be performed, he will not be excused or become entitled to additional compensation on account of unforeseen difficulties.

2. CONTRACTS ⟸280(3)—BUILDING TO PLANS AND SPECIFICATIONS.
If contractor is bound to build according to owner's plans and specifications, owner will be

responsible for consequences of defects in plans and specifications, despite clauses requiring checking of plans, etc.

3. UNITED STATES ⇐73—CONTRACT—UNFORESEEN DIFFICULTY — RISK OF ADEQUACY OF RELOCATED SEWER.

Where dry dock was to be built in accordance with plans furnished by the United States, and contract provided for necessary relocation of sewer, articles prescribing its character, dimensions, and location imported warranty that if complied with sewer would be adequate, and, despite general clauses requiring contractor to examine site, etc., he could refuse to resume work where he relocated sewer as provided, and it was not sufficient, and, when government annulled contract without justification, it became liable in damages.

4. UNITED STATES ⇐70(1)—CONTRACTS—REDUCTION TO WRITING—IMPLIED WARRANTY —STATUTE.

Rev. St. § 3744 (Comp. St. 1916, § 6895), providing that contracts of the Navy Department shall be reduced to writing, did not preclude contractor to build dry dock from relying on government's warranty, implied by law from provisions of contract, that if he made necessary relocation of sewer as prescribed it would be adequate to permit erection of dry dock.

5. EVIDENCE ⇐441(7)—PAROL EVIDENCE AFFECTING WRITING—IMPLIED WARRANTY.

The parol evidence rule did not preclude a dry dock contractor from relying on the government's warranty, implied by law from provisions of contract, that if he made necessary relocation of sewer as prescribed it would be adequate to permit erection of dry dock.

6. CONTRACTS ⇐319(1) — PARTIAL PERFORMANCE—DAMAGES—PERFORMANCE PREVENTED BY DEFENDANT.

A contractor, who, after partially performing his contract, is wrongfully prevented by the other contracting party from completing it, may recover actual expenditures made by him on account of the contract, and also damages for loss of profits.

Appeals from the Court of Claims.

Suit by George B. Spearin against the United States. From judgment for plaintiff (51 Ct. Cl. 155), both parties appeal. Affirmed.

Messrs. Frank W. Hackett, of Washington, D. C., and Charles E. Hughes, of New York City, for Spearin. Mr. Assistant Attorney General Thompson, for the United States.

*133 *Mr. Justice BRANDEIS delivered the opinion of the Court.

Spearin brought this suit in the Court of Claims demanding a balance alleged to be due for work done under a contract to construct a dry dock and also damages for its annulment. Judgment was entered for him in the sum of $141,180.86 (51 Ct. Cl. 155), and both parties appealed to this court. The government contends that Spearin is entitled to recover only $7,907.98. Spearin claims the additional sum of $63,658.70.

First. The decision to be made on the government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for $757,800 a dry dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert and relocate a section thereof before the work of constructing the dry dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material and location of the section to be *substituted. All *134 the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry dock, with a 7-foot sewer which emptied into Wallabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5½ feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the government's plans and blueprints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The government officials concerned with the letting of the contract and construction of the dry dock did not know of the existence of the dam. The site selected for the dry dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these government officials and others. But the fact had not been communicated to Spearin by any one. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy *Yard information concern- *135 ing the conditions and probable cost of the work; but he had made no special examination of the sewers nor special inquiry into the possibility of the work being flooded thereby, and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed

responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was $3,875. But it was unsafe to both Spearin and the government's property to proceed with the work with the 6-foot sewer in its then condition. The government insisted that the responsibility for remedying existing conditions rested with the contractor. After 15 months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry dock, under radically changed and enlarged plans, was completed by other contractors, the government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time $210,939.18 had been expended by Spearin on the work; and he had received from the government on account thereof $129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of $60,000 and its judgment included that sum.

*136 [1, 2] The general rules of law applicable to these facts are well *settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Day v. United States, 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219; Phœnix Bridge Co. v. United States, 211 U. S. 188, 29 Sup. Ct. 81, 53 L. Ed. 141. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. Simpson v. United States, 172 U. S. 372, 19 Sup. Ct. 222, 43 L. Ed. 482; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. MacKnight Flintic Stone Co. v. The Mayor, 160 N. Y. 72, 54 N. E. 661; Filbert v. Philadelphia, 181 Pa. 530;† Bentley v. State, 73 Wis. 416, 41 N. W. 338. See Sundstrom v. State of New York, 213 N. Y. 68, 106 N. E. 924. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by Christie v. United States, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933; Hollerbach v. United States, 233 U. S. 165, 34 Sup. Ct. 553, 58 L. Ed. 898, and United States v. Stage Co., 199 U. S. 414, 424, 26 Sup. Ct. 69, 50 L. Ed. 251, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

†37 Atl. 545.

[3] In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry dock proper. It was as necessary as any other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the government that the present case is to be distinguished from the Bentley Case, supra, and other similar cases on the ground that the contract with reference to the sewer is purely collateral is clearly without *merit. The risk of *137 the existing system proving adequate might have rested upon Spearin, if the contract for the dry dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site,[1] to check up the plans,[2] and to assume responsibility for the work until completion and acceptance.[3] The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

[4, 5] Neither section 3744 of the Revised Statutes (Comp. St. 1916, § 6895) which pro- *138 *vides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup.

[1] "271. *Examination of Site.*—Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

[2] "25. *Checking Plans and Dimensions; Lines and Levels.*—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. * * * The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

[3] "21. *Contractor's Responsibility.*—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. * * *"

Ct. 537, 28 L. Ed. 86. The breach of warranty, followed by the government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry dock. When the government refused to assume the responsibility, he might have terminated the contract himself, Anvil Mining Co. v. Humble, 153 U. S. 540, 551, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; but he did not. When the government annulled the contract without justification, it became liable for all damages resulting from its breach.

[6] Second. Both the main and the cross appeal raise questions as to the amount recoverable.

The government contends that Spearin should, as requested, have repaired the sewer and proceeded with the work; and that having declined to do so, he should be denied all recovery except $7,907.98, which represents the proceeds of that part of the plant which the government sold plus the value of that retained by it. But Spearin was under no obligation to repair the sewer and proceed with the work, while the government denied responsibility for providing and refused to provide sewer conditions safe for the work. When it wrongfully annulled the contract, Spearin became entitled to compensation for all losses resulting from its breach.

Spearin insists that he should be allowed the additional sum of $63,658.70, because, as he alleges, the lower court awarded him (in addition to $60,000 for profits) not the difference between his proper expenditures and his receipts from the government, but the difference between such receipts and the value of the work, materials, and plant (as reported by a naval board appointed by the de- *159 *fendant). Language in the findings of fact concerning damages lends possibly some warrant for that contention; but the discussion of the subject in the opinion makes it clear that the rule enunciated in United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, which claimant invokes, was adopted and correctly applied by the court.

The judgment of the Court of Claims is, therefore, affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of these cases.

(248 U. S. 165)

WELLS FARGO & CO. v. STATE OF NEVADA.

(Argued Nov. 14, 1918. Decided Dec. 16, 1918.)

No. 40.

1. COMMERCE ⟸72—INTERSTATE COMMERCE—TAXATION OF PROPERTY.

While, under the commerce clause of the federal Constitution, a state may not tax the privilege or act of engaging in interstate commerce, it can tax the carrier's property within the state, though chiefly employed in such commerce.

2. COURTS ⟸366(6)—STATE DECISIONS—CONCLUSIVENESS.

In so far as ruling of state court, that the state is not concluded by assessor's entry as to whether tax was on property or privilege, turns on the authority of the state board and the assessor under the state statute, and the relative effect to be given their acts, it is not reviewable by the national court.

3. CONSTITUTIONAL LAW ⟸284(2)—DUE PROCESS—TAXATION—ASSESSMENT—NOTICE.

There is no want of due process within the Fourteenth Amendment because of valuation by board for taxation being without notice to property owner; the mode of enforcing the tax (Rev. Laws Nev. §§ 3659-3665) being by a judicial proceeding wherein process issues and an opportunity is afforded for a full hearing, and payment being enforced only after there is a judgment sustaining the tax.

In Error to the Supreme Court of the State of Nevada.

Action by the State of Nevada against Wells Fargo & Co. Judgment for plaintiff was affirmed by the Supreme Court of Nevada (38 Nev. 505, 150 Pac. 836), and defendant brings error. Affirmed.

Messrs. Charles W. Stockton, of New York City, Henry M. Hoyt, of San Francisco, Cal., and Harry S. Marx, of New York City, for plaintiff in error.

Mr. William C. Prentiss, of Washington, D. C., for the State of Nevada.

*Mr. Justice VAN DEVANTER delivered *165 the opinion of the Court.

This was an action to enforce a tax levied in Humboldt county, Nevada, against the express company. Several objections were interposed, some presenting local and others federal questions, but all were overruled and payment of the tax directed. 38 Nev. 505, 150 Pac. 836. This writ of error was allowed prior to the Act of September 6, 1916, c. 448, 39 Stat. 726.

The federal questions are all that we can consider, and they are: Whether the tax was laid on the privilege or act of engaging in interstate commerce, whether the tax proceedings were without due process of law and whether they otherwise were such as to make the tax a burden on interstate commerce.

The company is a Colorado corporation engaged in the express business in this and other countries. One of its lines extends through Humboldt and other counties in Nevada, over the Southern Pacific Railroad, and is used in both intrastate and interstate commerce, but principally the latter. The tax was for the year 1910.

As construed by the state court, the statute [1] under which the tax was imposed does not provide for a privilege or franchise tax, but only for an ad valorem property tax. Acting under the statute, a state board valued the company's personal property, tangi-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Revised Laws 1912, §§ 3621, 3622, 3624, 3797-3801, 3807.