

O. B. Sansum and George H. Shields, for plaintiff.

Given Campbell and Thomas J. Portis, for defendant.

TREAT, J. As to the structure of the bill and the principles involved, the views of this court were heretofore expressed;¹ following *Case v. Beauregard*, 99 U. S. 119, and S. C. 101 U. S. 688. As to the shipment on the *Sallie Pearce*, the contract was that of a common carrier. As to the *Colossal* there has been some testimony offered in order to determine whether the contract was simply that of towage or that of a common carrier. The court holds that it was simply a towage contract, which is apparent, not only from the face of the written contracts themselves, but also from the facts as developed that said barge and cargo belonged to the shipper. Whether this be so or not is of no moment, in the view the court takes of the case. There were two accidents; one as to the *Sallie Pearce*, and the other as to the *Colossal*. As usual in such cases there is a great conflict of testimony. Hence, the court has sought to reach a correct conclusion by examining the physical facts and circumstances connected with each disaster. The conclusion reached is that each disaster was caused by an inevitable accident, falling within the expected perils of the river.

The bill will be dismissed, with costs.

RUTTEN *v.* UNION PAC. RY. Co. and another.

(*Circuit Court, S. D. New York. July 25, 1883.*)

RAILROAD BONDS—CONSOLIDATION OF RAILROAD COMPANIES—BILL TO ENFORCE LIEN.

The holder of the bonds of a railroad and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land, and the operation of its road and line, which have passed by consolidation to another railroad company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after default in payment of the principal of such bonds, and interest according to the terms thereof.

In Equity.

Simon Sterne, for orator.

Artemas H. Holmes, for defendant.

WHEELER, J. This case is not like *Walser v. Seligman*, 13 FED. REP. 415, and *Jones v. Green*, 1 Wall. 330, and that class of cases, which are mere creditors' bills, seeking a decree against the holder of the debtor's property solely because it is the debtor's property and the defendant has it; nor like *Whipple v. Union Pac. Ry. Co.* Sup. Ct. Kan., where a personal judgment was sought for personal injuries

¹See 10 FED. REP. 596, and 13 FED. REP. 516.

on the road of one of the constituent companies of the defendant before consolidation; nor like *Hayward v. Andrews*, 106 U. S. 672, [S. C. 1 Sup. Ct. Rep. 544,] and *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 2 Sup. Ct. Rep. 279, (Sup. Ct. U. S., Oct. Term, 1882,) where the equitable assignee of a purely legal right of action was seeking relief in equity,—the principles of all of which have been invoked in support of this demurrer by the defendant the Union Pacific Railway Company. According to the allegations of the bill the orator is the bearer of the bonds of the defendant the Denver Pacific Railway & Telegraph Company, payable to bearer, with interest semi-annually, secured on the income from the sale of its lands, and the operation of its road and line, which have passed by the consolidation to the other defendant. He is not an assignee merely of the bonds, but is, as bearer, an original payee, to whom the promise runs directly. *White v. Vermont & M. R. Co.* 21 How. 575.

The orator is not seeking to enforce any personal liability of the Union Pacific Railway Company, as founded upon its own undertaking or wrongful act; and does not claim that that defendant is liable for the undertakings or acts of the other. The grounds of relief upon which he stands rest entirely upon his relation to the property of the latter in the hands of the former. This relation is not that of a creditor at large merely, as mentioned by Judge WALLACE in *Walser v. Seligman, supra*; it is that a creditor having a specific lien upon the income of property which has gone from his debtor into the hands of the other defendant. Perhaps the debtor corporation is, by the consolidation agreement, so far left in existence that he could maintain an action at law against it, and have execution, and by it reach any specific property that was the property of the debtor at the time of consolidation, if there is any such; and as to the general property of the debtor, upon which he has no lien, he would be obliged to exhaust that remedy, as shown in the cases mentioned on that subject, before proceeding against others on account of such property; but he has a lien upon this income, which he has a right to pursue, independently of any proceeding at law, to reach other property, or any foreclosure of specifically mortgaged property. He has the clear right to avail himself of any one of all his securities by pursuing any one of the appropriate remedies for that purpose. This income, in the hands of the Union Pacific Company, never was the property of the Denver Pacific, and could not be reached by judgment against that company, and the orator can have no judgment against the Union Pacific Company. This lien can be enforced only in equity, and this bill seems to be appropriate to enforce it. The interest coupons for several years are due, and this income is alleged to be sufficient to meet them. By the terms of the bonds, default of interest for 60 days after demand made the principal "subject to become due and payable;" which is understood to mean, subject to be-

come so at the option of the holder; and this bill shows no election of the orator to have these bonds become due.

As the case stands, the orator has this debt, equal to the amount of the coupons, secured upon this income large enough to meet it in the hands of the Union Pacific, which he can reach only in equity, and which this bill is appropriate to reach. Unless this is changed by the answer he seems entitled to the relief asked.

The demurrer is overruled; the defendants to answer over by the September rule-day.

MILNE *v.* DOUGLASS.¹

(Circuit Court E. D. Missouri. July 3, 1883.)

1. PLEADING—DEFECT IN ALLEGATION SUPPLIED BY EVIDENCE—PARTNERSHIP.

Where, after the dissolution of a firm, one of the partners brought suit in his own name for damages suffered by the firm from a breach of a contract made with it, and the allegations of his petition as to his right to sue in his own name were vague, but it was proved at the trial of the case that the firm had been dissolved by an agreement between the partners, and that the plaintiff, as continuing partner, succeeded by the terms of the agreement to all the rights of the firm, *held*, that the evidence supplied the defect in the petition.

2. COMMON CARRIER—UNNECESSARY DELAY—DAMAGES.

Where there is unnecessary delay on the part of a common carrier in the delivery of goods which he has undertaken to transport, and the market price of such goods at the place of delivery is lower at the time of delivery than at the time when the delivery should have taken place, the carrier is liable in damages for the difference between the value of the goods at the former and their value at the latter date, at market prices.

This is a suit by John Milne against John M. Douglas, receiver of the Ohio & Mississippi Railway Company, the New York, Pennsylvania & Ohio Railway Company, the New York, Lake Erie & Western Railway Company, and the Red Cross Line of steam-ships.

The plaintiff states in his petition "that he is the successor in business to the copartnership formerly existing and doing business as produce commission merchants at Dundee, Scotland, where he resides, under the firm name of Milne & Berry; that he receives payment of accounts due to, and discharges the obligations of, the said firm; that he carries on the business for his own account at old premises," etc. It appeared from the evidence that the firm of Milne & Berry had been dissolved by an agreement of the partners prior to the institution of this suit, and that by the terms of the agreement Mr. Milne succeeded to all the firm's rights and assumed all their obligations.

George M. Stewart and *Paul Bakewell*, for plaintiff.

Garland & Pollard, for defendant.

¹ Reported by B. F. Rex, Esq., of the St. Louis bar.

TREAT, J. The views of the court heretofore expressed¹ control as to the law. The action is for damages sustained in consequence of unnecessary delay by a common carrier in the delivery of goods. The court has been largely aided by counsel, through tabulation of many dates pertaining to the injury, but has still been left to ascertain values at Dundee, Scotland, at two dates, as best it could, through a mass of papers which are vague and uncertain. The first point presented is as to the right of the plaintiff to recover in his own name. The allegation is indistinct; but the defect, if any, may be considered as supplied by the proofs, viz., the right of the surviving partner to sue. An analysis as to the various shipments, and as to the times when the property shipped should respectively have reached Dundee under the circumstances, and also as to the prices at the time when the flour should have arrived and when it did actually arrive, shows that there were only six car-loads which arrived at Dundee on February 18th, instead of February 4th. From February 4th to February 18th there was no change in prices. There were two car-loads which should have arrived on February 4th, but did not arrive until March 26th or March 30th. There was a fall in the prices between those dates of one shilling per sack, making a loss of £20, which, at United States rates, amount to \$97.32, for which judgment will be entered.

UNITED STATES *ex rel.* MYRA CLARK GAINES *v.* CITY OF NEW ORLEANS.²

(Circuit Court, E. D. Louisiana. June, 1883.)

1. MANDAMUS.

Where it appears, upon the return to a writ of execution against a municipal corporation, that, in reply to a demand made upon him, the mayor stated that the defendant had no property to satisfy the writ; that numerous similar writs had within a few months and within a few days been issued against defendant and returned unsatisfied, and in the return to the rule for the *mandamus* the defendant sets up that there are judgments against the defendant prior to that of relator wholly unsatisfied,—nothing could more fully establish the right of the relator to have a *mandamus* to cause the levy of a tax to pay her judgment.

2. MUNICIPAL CORPORATION.

Where a municipal corporation, by the authority of a statute, contracted a liability, in the absence of any other provision of the law for payment, she necessarily had power to bind herself, and did bind herself, to pay, by the exercise of those "powers incident to municipal corporations" with which she was endowed by the statute, *i. e.*, by levying a tax.

3. SAME—DAMAGES FOR A TORT—LA. CIVIL CODE, 2315.

"Every act whatever of man that causes damage to another, *obliges* him through whose fault it happened to repair it." La. Civil Code, 2315. The meaning of this is that under Louisiana law the wrong done by one human

¹13 FED. REP. 37.

²Reprinted by Joseph P. Hornor, Esq., of the New Orleans bar.

being to another, or to his estate, creates an obligation; *i. e.*, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. This provision includes municipal corporations as among those who are subject to this obligation.

4. SAME—DEBTOR'S PROPERTY PLEDGED TO CREDITORS—LA. CIVIL CODE, 3183. "The property of the debtor is the common pledge of his creditors." La. Civil Code, 3183. The meaning of this is that the property of the debtor is pledged so that it might be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be reached by seizure under a writ of *feri facias*; the property of a debtor which is a municipal corporation may be reached by taxation.
5. SAME—RETROACTIVE LAWS—LA. CIVIL CODE, 8. "A law can prescribe only for the future; it can have no retrospective operation." La. Civil Code, 8. This article has the paramount force of a constitutional provision; it is a regulation of the power of all subsequent laws, whether they be found in future constitutions or future statutes; it is a statutory declaration and covenant on the part of the state incapacitating subsequent laws from disturbing any obligations.

When these three provisions are put together, it results that the state placed the wrong-doer under an obligation; for the fulfillment of that obligation subjected all his present and future property to a pledge; and contracted that the law-making power should pass no law which should affect that obligation or that pledge. It follows, then, that at whatever time the obligation of the defendant to the relator was incurred, at that time there was, by operation of the statute, an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation.

6. CONDITIONAL OBLIGATIONS.

The jurisprudence of Louisiana is settled that in conditional obligations the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties.

7. LA. CONSTITUTION, ART. 209; ACT 93 OF LA. OF 1856, P. 68.

The article 209 of the present constitution of Louisiana, and the act No. 93 of 1856, p. 68, had no reference to already existing obligations of any sort.

8. LA. CONSTITUTION, ART. 11.

"All courts shall be open, and every person, for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay." La. Const. art. 11. This provision is applicable to the redress for all wrongs done to person or property, and to that extent gives, for the redress for wrongs, a remedy completely adequate; *i. e.*, a satisfaction limited only by the property of the debtor.

Application for *Mandamus*.

W. R. Mills, A. Goldthwaite, and J. Ward Gurley, Jr., for the relator.

Charles F. Buck, City Atty., for the respondent.

BILLINGS, J. This cause is submitted upon an application for a *mandamus* to compel the levy of a tax to pay a judgment rendered in this court. There are two preliminary objections: (1) That there has been issued no alternative writ of *mandamus*. The answer to this objection is that the proceedings in this cause—namely, the petition, which, together with an order to show cause, has been served upon the persons against whom the writ is sought—are such as have been invariably followed in this court in the hundreds of causes where similar writs have been allowed, and constitute precisely the mode of procedure pointed out by the Code of Practice. That an alternative writ is not a prerequisite for this process, see *Com'rs v. Aspinwall*,

24 How. 385. (2) That no return of *nulla bona* upon the writ of *feri facias* has been made. The *mandamus* is asked for the amount of the judgment, less \$40,000, the amount covered by a seizure under the writ of execution. The return of no property would be only very strong evidence that the *mandamus* was necessary for the recovery or collection of the judgment. The proof is that the mayor, when demand was made to point out property, stated to the marshal that the defendant had none wherewith to satisfy the writ, either wholly or in part; that numerous similar writs have, within the past few months and within a few days, been issued against the defendant and returned unsatisfied; and in the defendant's return the ground is set up that there are judgments against the defendant prior to the relator's, and wholly unsatisfied, amounting to \$700,000, or thereabouts. No return in this case could more fully establish than does this evidence that the relator must have the levy of a tax to pay her judgment, or that it will remain unpaid. The evidence shows, and, indeed, the return of the defendant admits this, and pleads a statute which would dispense with a *feri facias*. Under such proofs, and with such a return, the return of the execution is immaterial. High, E. Rem. § 377.

The real question, then, comes to be considered, has the relator shown herself to be entitled to a tax? This means, has the law-making power authorized and bound the city of New Orleans to assess and levy and collect a tax to pay relator's judgment?

The relator's demand, which is represented by this judgment, is for taking possession of her land and preventing her recovery of it from the year 1837 to the year 1877. The various charters of the city of New Orleans show that prior to and since the year 1836 the city has had "all such rights, powers, and capacities as are incident to municipal corporations," and also the capacity of "acquiring, enjoying, and alienating all kinds of property, real, personal, and mixed." Acts 1805, p. 46, § 1, and p. 56, § 6; Acts 1836, p. 31, § 4; Acts 1852, p. 48, § 22; Acts 1856, p. 136, § 1; and Acts 1870, Ex. Sess. p. 30, § 2.

The record shows that the debt or obligation merged in the judgment sprang out of the acquisition, enjoyment, and alienation of real property, and was, therefore, incurred in the exercise of the powers specially granted. This is conclusively settled by the judgment itself in this case, as well as by that in the case of *Gaines v. New Orleans*, 6 Wall. 716, and 15 Wall. 624.

In *Rabassa v. Orleans Navigation Co.* 5 La. 463, 464, the court state the question submitted to be whether a corporation is responsible for an injurious act in relation to a matter within the scope of its corporate objects. They answer the question in the affirmative, and say:

"If they [the corporation] rented a house and committed waste during the lease, or made themselves responsible by the non-performance of any obliga-

tion which the law imposes on the lessee, it can hardly be questioned that they would be bound to make good the loss. If it be objected that, in the case last put, the responsibility grew out of a contract, we can hardly see how their liability would be varied, if, without a contract, they entered upon the property of another and used it for corporate purposes."

Since the corporation, by the authority of the statute, contracted the liability, in the absence of any other provision of the law for payment, she necessarily had power to bind herself, and did bind herself, to pay by the exercise of those "powers incident to municipal corporations" with which she was also endowed by the statute, *i. e.*, by levying a tax. This reasoning is adopted and this conclusion is maintained by the supreme court of the United States with reference to a debt evidenced by a bond; but the conclusion is just as unavoidable with respect to all debts which originate in the exercise of granted powers.

The facts which beyond doubt authorize the conclusion that the power to tax exists are these: That the obligation is contracted or springs up inside of the granted powers; that there is no other mode of performance; that the power to tax is one of the usual powers incident to cities, and is therefore granted; and the conclusion is established with equal certainty whether the obligation be written or verbal, express or implied, resulting from a contract or tort, provided the act creating the obligation is within the delegated corporate faculties. In the language of the supreme court in *Rabassa v. New Orleans Nav. Co.*, *supra*, "We cannot see how the liability would be varied if, without a contract, they [the corporation] entered upon the property of another and used it for corporate purposes."

The supreme court of the United States, in *U. S. v. New Orleans*, 98 U. S. 393, says: "When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be, in express terms, prohibited." Again, at page 397, the court say: "As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation."

I think it is established beyond successful controversy that the city of New Orleans has the power, and may be compelled, to levy this tax, unless, as is urged by the defendant, the power of taxation, with reference to this indebtedness, is qualified and controlled by the statute of 1856, and by article 209 of the constitution of 1879.

The act of 1856, No. 93, p. 68, provides that "the power to tax is limited to 1½ per cent. of the assessed value of real estate and slaves, provided that such an amount shall be raised thereby as shall be sufficient to pay the interest of the present city debts, together with the gradual reduction of the capital of the consolidated debt, as required by the laws now in force."

The article 209 of our present constitution is as follows: "And no

parish or municipal tax for all purposes whatsoever shall exceed 10 mills on the dollar of valuation;" provided that by a vote of the inhabitants further taxation for certain improvements is allowable. It is to be observed that if this statute and constitutional provision affect this obligation, it cannot be denied that they would practically take away all remedy for the relator.

I shall, in this connection, and for the purpose of testing the argument urged by the defendant, assume, what I think is not the fact, that the act of 1856 and article 209, above set forth, were intended to affect pre-existing obligations. If they were such limitations they would be utterly void, as impairing a contract entered into on the part of the state of Louisiana itself.

There are three provisions of the statute, found in three articles of our Civil Code, each having been adopted many years prior to 1836, which require to be considered collectively in order to see just what the state has done, and has obligated itself not to do.

(1) Civil Code, art. 2315, (old 2294:) "Every act whatever of man that causes damage to another, *oblige*s him through whose fault it happened to repair it." The meaning of this is that, under our law, the wrong done by one human being to another, or to his estate, creates an obligation; *i. e.*, brings at once into existence the relation of debtor and creditor between the wrong-doer and the injured party. This provision includes municipal corporations as among those who are subjected to this obligation. *McGary v. City of Lafayette*, 12 Rob. 668; S. C. 4 La. Ann. 440; *Rabassa v. Navigation Co.* 5 La. 463, 464; *Wilde v. City of New Orleans*, 12 La. Ann. 15; and *Gaines v. New Orleans*, 6 Wall. 716.

(2) Civil Code, art. 3183, (old 3150:) "The property of the debtor is the common pledge of his creditors." The preceding article subjects to the common pledge all the debtor's present and future property. The meaning of this is that the property of the debtor is pledged, so that it might be subjected to that process of the creditor which may be suitable to the case; the property of an individual debtor may be reached by seizure under a writ of *feri facias*; the property of a debtor which is a municipal corporation may be reached by taxation.

(3) Civil Code, art. 8: "A law can prescribe only for the future; it can have no retrospective operation." This article has the paramount force of a constitutional provision. It is a regulation of the power of all subsequent laws, whether they be found in future constitutions or future statutes. It is a statutory declaration and covenant on the part of the state incapacitating subsequent laws from disturbing any obligations. Having been in operation from 1808 to the present time, it attached to all obligations in this case as they sprang into existence, and controls and protects them.

When the three provisions are put together, it results that the state placed the wrong-doer under an obligation, for its fulfillment sub-

jected all his present and future property to a pledge, and contracted that the law-making power should pass no law which should affect that obligation or that pledge.

It is of no avail, then, to urge that the indebtedness of the defendant springs out of a wrong; for, under the statutory enactments above recited, the obligation to repair an injury inflicted by a tort is made to differ from that existing under the laws of any other state. It is immediately clothed with the properties of an indebtedness, and made the basis of a pledge, indestructible, upon present and future acquired property. Nor does it avail to urge that the relator, for all these years, had but a chose in action, a litigious right, and that the limitation affected the remedy alone. Hers was a right of action inhering in an obligation created by the statute, which, through the form of a remedy, was secured by the pledge of the debtor's entire property through taxation, under a covenant on the part of the state that it should not be lessened nor impaired by future legislation. The subsequent legislation, if applicable and valid, would utterly destroy this created and guaranteed right, for it would take away all possible remedy. "A right," say our supreme court, in *Sabatier v. Creditors*, 6 Martin, N. S. 590, "without a legal remedy, ceases to be a legal right." And again, at page 591, the court say: "On the implied obligation of the property being liable for the engagements of the debtor, the legislature cannot deprive the creditor of recourse on it." In *Com'rs v. Bean*, 3 Rob. 415, the court say: "The legislature cannot constitutionally, by any act subsequent to the creation of a debt, interfere to change or disturb the relation between debtor and creditor."

It is the express contract on the part of the state which has been violated, if these limitations are set up between the creditor and his remedy, that contract being to the effect that there should be a pledge of the present and future property of the defendant, and that no future law should disturb that pledge. In a case certainly no stronger the supreme court of the United States say: "The state and the corporation are, in such cases, equally bound." *Von Hoffman v. Quincy*, 4 Wall. 535.

This, in substance, is the question which was determined in *Green v. Biddle*, 8 Wheat. 1. There a compact entered into by the state of Kentucky, and incorporated into its constitution, had declared that all private rights and interests in land within a district should be determined by the laws existing in Virginia at the date of the cession of that district. A subsequent act of the legislature of Kentucky sought to relieve the occupants of land within the ceded district from damages for its wrongful detention before action brought. This act, though affecting only the remedy, and that in case of torts, since the continuance of that remedy had been promised by the state, was held to be void.

That case is conclusive upon the relators. In that case there had been an undertaking on the part of the state that the laws existing

at a certain time should regulate the recovery for mesne profits; in the relator's case there had been an undertaking on the part of the state that the laws in force when the right to recover originated should not be changed. In that case the undertaking was sought to be disregarded by a withdrawal of the right to recover; in the relator's case, by a withholding perpetually by limitation the guaranteed remedy, and, practically, all remedy, for the right. Both these cases are protected. *Wolff v. New Orleans*, 103 U. S. 367.

It follows, then, that at whatever time the obligation of the defendant to the relator was incurred, at that time there was by operation of the statute an inviolable pledge created, which should operate as well upon the future as upon the present, and should give her payment by taxation according to the power of taxation with which the defendant was then invested. When was this obligation incurred?

The defendant had in bad faith gone into possession of relator's land, had sold the same and conveyed it with warranty, and by various devices kept the relator from recovering possession for a period of 41 years, and until the year 1877. The obligation of the defendant, since the city was vendor and warrantor and constructive possessor, all in bad faith, was to restore to her vendee the price, and acquit the vendee; that is, restore, for the vendee, the fruits to the owner, the relator. The obligation to restore the fruits originated at the same time with the obligation to restore the thing out of which the fruits issued—the land; *i. e.*, at the time of the sale and warranty in 1836. The condition upon which the obligation could be enforced, *i. e.*, the recovery of possession, did not take place till 1877. Civil Code, arts. 498–502. Our jurisprudence is settled that, in conditional obligations, the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties. *Town v. Syndics of Morgan*, 2 La. 112. The measure, therefore, of relator's right to a tax must be determined by the law in force in 1836, and at that time there was no limit, neither in the constitution nor the statute. At that time, whatever debts the corporation incurred in the exercise of her corporate powers, which had been conferred by the legislature, whether by contract or by tort, she could be compelled to levy a tax to pay.

I have thus far considered the question upon the hypothesis that the act of 1856 and the article 209 of the present constitution were intended to apply to antecedent indebtedness. But, in my opinion, it is manifest that this statute and this article had no reference to already existing obligations of any sort. The very terms of the act of 1856 show that the limitation was to be operative only provided the tax thus afforded should be sufficient to pay the interest and the maturing principal. The care taken to make provision for all outstanding obligations is manifest.

The portion of the act of 1876 which withdraws the power of taxation has been declared void so far as concerns antecedent contract

obligations. This would for the same reason be true with regard to antecedent obligations not contract in their origin, but protected by a statutory contract which attached to them at their inception and adhered to them ever afterward.

"The article 209 of our constitution was designed and ordained as a limit upon the expenditures of the parishes and cities—as a rule of rigid economy in the administration of their affairs. To that extent it may be invoked. It has no force nor application to obligations already completely incurred. Those who contend that it was intended to work a rejection, or, what is the same, an indefinite paralysis, of pre-existing obligations, must treat the provision as really stating that in order to secure moderate taxation all outstanding obligations are to be set aside and disregarded. The statement of such a construction should be its refutation.

The supreme court of this state has refused to observe this as a limit, so far as concerns indebtedness antecedently incurred springing from contracts. This case cannot in principle be distinguished from that. Under our law an obligation, the *vinculum juris*, which, in case of torts, in the other states, creates a definite hold upon the property of the debtor only after judgment and process issued, is made to attach to the property of the debtor by as indissoluble a tie from the moment of the commission of the act which is its source in case of an act of wrong as of an act of contract. In this state, when one takes or detains another's property, the state has promised the same compensation, and has connected that promise by a direct and present tie with the estate of the author of the act, as irrevocably as when one makes and delivers a promissory note.

If, therefore, as all concede, the obligation springing from a pre-existing contract does not fall within or is not controlled by this constitutional limitation, for the reason that it cannot be impaired, it must follow that, under our law, so far as concerns the resort to the property of the obligor, the antecedent obligation springing from a wrongful act is equally excluded, for the reason that that resort is by a statute which entered into the obligation secured, and future withdrawal or modification is by another statute, also forming a part of the obligation guaranteed against.

The limitations urged by the defendant, if intended to reach this obligation, would have been ineffectual, because void. But they were not so intended. They applied only to the future. The provisions of our present constitution specifically deal with the redress for wrongs, and to the honor and credit of the state be it said, in case of damages arising from wrongs, it has torn aside and destroyed all exemptions and limitations which could be held to operate upon the right to resort to the property of the wrong-doer. Article 11 provides that "all courts shall be open, and every person, for injury done him in his rights, lands, goods, person, or reputation, shall have adequate remedy by due process of law, and justice adminis-

tered without denial or unreasonable delay." I understand this provision to be applicable to the redress for all wrongs done to person or property, and to that extent to give to the redress for wrongs a co-equal if not paramount security to that guaranteed for the enforcement of contracts. I understand this provision to ordain, in behalf of those who, like the relator, are seeking reparation for injury done to themselves or their estate, not only that the courts shall be always open, not only that the courts shall have jurisdiction, not only that the suitors shall have a speedy and just trial, not only that there shall be awarded due process, but in addition to all there is solemnly ordained and guaranteed a *remedy entirely adequate*. This remedy is distinct from due process, for it is to be *by* due process. The words "adequate remedy" mean complete satisfaction of the judgment without restriction. The process will vary with the nature of the recovery and the character of the debtor. If the judgment decree the recovery of money, and the debtor be a natural person, it would be a writ of *fiery facias*. If the debtor be a municipal corporation, the process would be a writ of *mandamus* compelling the levy of a tax; for it is settled that the process for compelling satisfaction of a money judgment against a municipal corporation is a *fiery facias* or a *mandamus* for a tax. Both are declared to be process in execution. *Riggs v. Johnson Co.* 6 Wall. 198, and *Memphis v. Brown*, 97 U. S. 300.

The conclusion is that the relator has a right to the tax prayed for; that she acquired this right before there was any limitation upon the power of the city to tax, except that springing from its statutory capacities as a corporation; that if the statute of 1856 and article 209 of the constitution were intended to include this case, they would be void as impairing the obligation of a contract, the state having contracted that relator's right should be unaffected by subsequent laws; that these limitations were not intended to apply to pre-existing obligations where the right of the creditor, through a tort or a contract upon the property of the debtor, was fixed by an irrevocable law; that these limitations were established with as complete an absence of purpose as there was of power to cast off or repudiate antecedent indebtedness, but were ordained as wholesome checks upon future expenditures and the creation of subsequent debts; that with reference to that class of indebtedness to which belongs the one upon which the relator recovered her judgment, the present constitution of the state not only imposes no restriction upon the right to satisfaction by the levy of a tax, but, on the contrary, has placed that right beyond the reach of legislative action, and by its own force has given due process and complete remedy; that in this case that process is a *mandamus*, and that remedy is the assessment and levy and collection of a tax.

The case of *Wolf v. New Orleans*, 103 U. S. 358, was in principle like this case. There, as here, the judgment had been registered, and

no provision made for its payment in the annual budget, and the supreme court, after dealing with all the questions involved in the acts of 1870 and 1876, in their mandate prescribe the form and terms of the writ and the time of the levy of the tax. That mandate will be followed in this case.

So far as this proceeding is concerned, the defendant must be credited with the amount seized under the *fiery facias*, namely, the sum of \$40,000. For the balance of the judgment, with interest, the relator is entitled to a writ of *mandamus* as prayed for.

PRZYBYLOWICZ v. MISSOURI RIVER R. Co.

(Circuit Court, D. Kansas. November, 1881.)

1. CONSTITUTIONAL LAW—COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE.

The payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property.

2. SAME—ESTOPPEL—ACQUIESCENCE OF OWNER.

The owner of land may, by his own act, estop himself from demanding actual payment of compensation as a condition precedent to the taking for public uses, and if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits a public corporation to enter upon his land and expend money, and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from possession for want of payment of the compensation.

3. SAME—RAILROAD TAKING LAND.

Where the owner of land has knowledge that a railroad company has taken possession of his land and makes no objection, but permits the company to build its road and operate its trains over the land, and exercises all the rights appertaining to a right of way for public uses for a period of 10 or 12 years, he or his grantee cannot be permitted to eject the company from the land.

Motion for New Trial.

FOSTER, J. The constitution of the United States provides that private property shall not be taken for public use without just compensation, etc. The constitution of this state contains the wise and salutary provision that right of way shall not be taken by any corporation without full compensation therefor be first made, etc. And the supreme court of this state, and the courts of other states having a like provision, hold that the payment of this compensation is a condition precedent to any right divesting the owner of his possession; that a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property. With this rule of law we are in full accord, and regard it as based upon the highest and most sacred principles of justice.