

yet the former proves that there never was any established liability; while the latter, that all liability has been discharged by the act of the plaintiff in neglecting to sue. *Conway v. Wharton, supra; Shed v. Augustine*, 14 Kan. 282.

Again, it is insisted by counsel that defendant has waived the right to insist upon this defense. But how? Surely not by its conduct prior to the suit, for it demanded the examination; not by its pleading, for it specifically set up this defense; nor by its course on the trial, for it proved the demand and refusal. A party waives only when he fails to act when he ought to act. But defendant has at all times insisted on this defense. It has never misled the plaintiff, or acted in such manner as to induce him to believe that it had been waived. An insurer, it is true, by accepting preliminary proofs without objection, or alleging defects therein in its answer, waives all such defects and admits the proofs sufficient. That principle was recognized on this trial in respect to the magistrate's certificate; and that is the rule enunciated in the authorities cited by counsel. But that rule does not control in this respect. The right was insisted on in time. The answer pleaded the defense, and the proof on the trial sustained it. Finally, it is a defense. The stipulation is a valid one. It is one for the protection of the insurer, and not onerous to the insurer. It is akin to the stipulation requiring the insured to exhibit his books of account, invoices, etc.; one in the interests of justice and fair dealing. The insurer may insist on compliance, and the insured must comply or give a valid excuse therefor. *Mueller v. Insurance Co.* 45 Mo. 84; *Dewees v. Insurance Co.* 34 N. J. Law, 244.

Judgment will be entered in favor of the defendant for costs.

STATE OF TENNESSEE v. WHITWORTH, Trustee, etc.

(Circuit Court, M. D. Tennessee. 1884.)

1. TAXATION—CHARTER EXEMPTION OF CAPITAL STOCK OF RAILROAD—EXEMPTION OF INDIVIDUAL INTERESTS OF STOCKHOLDERS—OBLIGATION OF CONTRACT.

The perpetual exemption of the capital stock of a railroad corporation from taxation, by the provisions of its charter, covers the individual interest therein of the stockholders; and a subsequent law imposing a tax on the shares owned by them impairs the obligation of the contract between them and the state, and is unconstitutional and void.

2. SAME—POWER OF LEGISLATURE.

The legislature of a state may distinguish between the interest of a corporate body in its capital or capital stock and that of the individual shareholder as separate subjects of taxation; so that one may be taxed and the other exempt, or both governed by the same rule of taxation or exemption, at its discretion.

3. SAME—NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY.

The Nashville, Chattanooga & St. Louis Railway Company having succeeded to all the rights and franchises of the Nashville & Chattanooga Railway Company and the Nashville & Northwestern Railway Company, the shareholders

of the new company are entitled to exemption from taxation under the provisions in the charters of the old companies that "the capital stock * * * shall be forever exempt from taxation;" and the act of March 1, 1869, passed by the legislature of Tennessee, taxing such shares, violates the obligation of contract and is void.

Mandamus.

MATTHEWS, Justice. This proceeding in *mandamus* was commenced by the state of Tennessee, on its own behalf, and upon the relation of Davidson county and the city of Nashville, in the circuit court of that county, to compel the defendant, trustee of said county, to assess for taxation, in favor of the state, county, and city, the shares of stock owned by individual shareholders in the Nashville, Chattanooga & St. Louis Railway Company. The alleged duty required of the defendant, is imposed by statute of the state,—an act of March 12, 1879, as amended by an act of March 28, 1883,—whereby all collectors of taxes, the defendant as trustee being one, are made "assessors to assess all property which, by mistake of law or fact, has not been assessed, whether the omission be for the particular year or years; and it is hereby made the duty of such collectors in all cases, where property has not been assessed, but on which taxes ought to be paid by law, to immediately assess the same, and proceed to collect the taxes."

The property sought now to be subjected to assessment for taxation, it is claimed, is within the purview of the act of March 1, 1869, which has been carried forward into every revenue act since passed, and is still in force, as follows:

"No tax shall hereafter be assessed upon the capital of any bank or banking association, or other joint-stock company, organized under the authority of this state or of the United States; but the stockholders in such banks and banking associations, or other corporations, shall be assessed and taxed upon the value of their shares and stock therein. Said shares shall be included in the valuation of the personal property of such stockholders in the assessment of state, county, or municipal taxes at the place, town or ward, or district where such bank, banking association, or other corporation is located, and not elsewhere, whether the said stockholder reside in said place, town, ward, or district, or not, but not at a greater rate than is assessed upon the moneyed capital in the hands of individuals in the state; and provided, further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by such bank or banking association, or other corporation; but the same shall be subject to state, county, municipal, and other taxation, and in the same manner as other real estate is taxed."

It was decided by the supreme court of Tennessee that this section included the case of taxing the shares of stock in a gas-light company, upon such grounds as also to embrace the case of taxing shares of stock in railroad companies. *Bedford v. Mayor of Nashville*, 7 Heisk. 409. The act of 1869 makes the tax a lien on the shares of stock subject to assessment, authorizes the collection of the tax from the avails of their sale, and makes it the duty of the corporation to retain all dividends belonging to such stockholder so far as necessary

to pay the taxes assessed upon his shares. There is much in the statute that seems inappropriate to the case of corporations other than banks and similar associations, where capital is employed in the form of money and securities; but, in view of the decision of the supreme court of the state, already referred to, no question is raised on the point. The case originally instituted in a state court was removed to this court on the ground that its decision necessarily involved a question arising under the constitution of the United States, it being claimed on the part of the defendant that the shares of stock sought to be subjected to assessment for taxation were exempt by a contract with the state contained in the charter of the Nashville, Chattanooga & St. Louis Railroad Company. It is now claimed on behalf of the state that it has the right to have the shares of stock in this corporation assessed for taxes by the tax collector of Davidson county, where it has its principal place of business, as the property of the holders at the time of the filing of the petition, for as many years as the books of the corporation show the stock to have been continuously owned by them since the passage of the act of 1869; and that these taxes, when assessed, become a lien upon the stock, for the payment of which the corporation itself is responsible to the extent of any dividends declared or settlements had by it with the shareholders since the filing of the petition; but when the stock has changed hands during years for which it was liable for taxation, it is not insisted that it is now to be assessed for such omitted taxes, so as to hold either the stock or the present owner liable therefor, nor that the assessment can go back prior to the year 1875, at which time, as appears by the answer, the old stock was surrendered, and the present stock created and issued.

The act to incorporate the Nashville & Chattanooga Railroad Company was passed on December 11, 1845. The thirty-eighth section of that act is as follows:

"The capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including work-shops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

A provision in the same language was contained in the charter of the Nashville & Northwestern Railroad Company; all of whose property and road, including all its rights and franchises, and the foregoing exemption, it is admitted, passed by a judicial sale to the Nashville & Chattanooga Railroad Company. The name of the latter was changed to the Nashville, Chattanooga & St. Louis Railway Company, and to enable it to pay for this and other roads acquired by it, this company was authorized to increase its capital stock to the present amount of \$6,670,331.20, divided into shares of \$25 each. It is claimed for the defendant in this proceeding that the perpetual exemption of the capital stock of the company from taxation covers the individual interest therein of the stockholders, the attempted violation of which is repugnant to that clause of the constitution of the