

If the complainants herein desired to bring about a more prompt administration of this estate, the way was open to them by proper action in the state courts. Having neglected to avail themselves of the proper remedy, they cannot complain in this court of the results of the delay, for which they are partly responsible. In fact it may be said generally of the attack made upon the proceedings connected with the settlement of the estate now in question that it is largely based upon matters which were entirely within the control and discretion of the probate court in the first instance. It appears more than possible that many of the criticisms made upon the action of the administrators have good foundation, and if exception had been taken thereto at the proper time, and in the proper court, much that is now complained of might have been avoided. We agree in general with the views advanced by counsel touching the evil of allowing estates to remain open without good reason, and in condemning the absorption of the property of estates in useless expenditures and liberal allowances for commissions and the like; but the remedy for such evils does not lie in encouraging the parties interested in the estate to remain inactive for years, and then, when the estate has been finally wound up by the probate court, to maintain a bill in equity against the administrator and his sureties, which in effect only proposes to reinvestigate and resettle the accounts of the administrator, which have already been passed upon and approved by the court primarily charged with that duty. The remedy for these evils, as is pointed out by the supreme court of Arkansas, consists in the exercise of diligence and watchfulness on the part of those interested in the estate, whereby all mistakes or wrongs can be promptly righted, and an effectual remedy be provided against the recurrence thereof in the future.

Under the facts developed in the evidence in this case, we find no sufficient ground calling for the interposition of a court of equity in setting aside the order of the probate court discharging the administrator and his sureties from further liability and in undertaking to restate the accounts passed upon by that court. The decree of the circuit court, dismissing the bill on the merits, is therefore affirmed, at costs of appellants.

BLACK v. BLACK.

(Circuit Court, E. D. Pennsylvania. February 2, 1893.)

No. 191.

WRIT OF ERROR—BOND—CORPORATION AS SURETY.

A corporation will not be accepted as surety on a writ of error to the United States supreme court when there is fair ground to question whether power to bind itself by such a contract is conferred by the acts under which it is incorporated.

At Law. Action by Mary K. L. Black, against Mary M. Black, administratrix of the estate of Edgar N. Black, deceased. Heard on application for the approval of the surety on a writ of error. Denied.

Francis Tracey Tobin, for application.
Richard C. McMurtrie, against application.

DALLAS, Circuit Judge. The defendant has in this case offered the Solicitors' Loan & Trust Company, or, as it is named in the letters patent of the governor of the state of Pennsylvania, the "Solicitors' Company," as surety upon writ of error to the supreme court of the United States. The defendant has filed three exceptions to the corporation so offered as surety, which amount, in substance, to an averment that said corporation is without authority to become such surety. Counsel for the respective parties have been fully heard, and the court has also had the benefit of an able presentation of the views of the counsel for the corporation in question, in support of its asserted power and authority to become surety on a bond such as is now under consideration. The power and authority asserted are claimed to be derived from and granted by an act of the general assembly of the state of Pennsylvania entitled "An act to provide for the incorporation and regulation of certain corporations," approved April 29, 1874, and the supplements thereto, under which this corporation was created; and also from and by a certain other statute of the same state, entitled "An act supplementary to" the act before mentioned, etc., approved the 9th day of May, 1889, (P. L. 159.)

For the plaintiff it is contended—First, that the power and authority in question are clearly not conferred by the act of 1874; and, second, that, though it is admitted that the act of 1889 does in terms give "the power and right" "to become security upon any writ of error or appeal, or in any proceeding instituted in any court of this commonwealth in which security may be required," the last-mentioned act cannot avail to entitle this corporation to be approved as surety in this case, because it has not been, in any manner or form whatever, accepted by the stockholders of the corporation. Exceptions to the sufficiency of a corporation tendered as surety may be founded upon either or both of two distinct grounds,—that it is not of pecuniary responsibility such as to warrant its approval, or that it is not possessed of lawful power to bind itself in the manner proposed. The first ground is not asserted, but in fact is wholly disclaimed. It therefore need not be, and is not, considered. The only question raised and to be passed upon is that which relates to the ground second above mentioned; and I may say, in passing, that in determining it no other matters, such as whether the writ of error, even upon approval of security, would or would not operate as a supersedeas, although discussed at bar, will be to any extent considered.

An affidavit of the secretary of the Solicitors' Loan & Trust Company has been submitted, and will be filed herewith, from which it appears that said company is accepted as surety in several of the courts of the state of Pennsylvania, and the records of this court disclose that it has been twice accepted here. It does not appear, however, that the point now made has ever been determined by, or even suggested to, any Pennsylvania court, and it is plain beyond question

that it has never, until now, been brought to the attention of this court. In the instance mentioned in the affidavit of the secretary the bond was filed in the clerk's office without even formal action by the court or any judge thereof. In the other case (*Earnshaw v. McHose*, Oct. Sess. 1890, No. 63) the written memorandum of counsel for the opposing party was indorsed upon the bond, "Security satisfactory," and this memorandum was signed by said counsel. Thereupon the security (on error) was formally "approved" by a judge of the court, but, manifestly, solely with reference to the prior approval of counsel, and cannot, therefore, be considered as a precedent.

I am compelled, accordingly, to view this question as one of first impression, so far as this court is concerned; but I cannot disregard the fact that probably, and as stated by counsel, many such bonds have been approved by other tribunals, and, at least in one instance, by this court, and are now outstanding. The effect of a positive decision adverse to the right claimed might be to unsettle, or to raise a doubt with respect to, other transactions, the parties to which are not before the court. I therefore decline to pronounce judgment as to the existence or nonexistence of the power of this company to become surety as proposed. It is not, I think, necessary that I should do so. The present application may be disposed of, and rightly, as I think, without the determination of that matter. If the objection to the proposed surety were based—as it is not—upon an averment of its financial irresponsibility, it might be rejected without deciding that it is, or is likely to become, insolvent; a reasonable doubt of its sufficiency to adequately secure the plaintiff would be enough. So, here, I need only say that the plaintiff has satisfied me that there is fair ground for questioning the power of this company to bind itself as proposed, and that I think a bondsman should be tendered, where demanded, as to whom no such question can reasonably be suggested. I have not overlooked the facts that the act of 1889 contains a provision for certification of its acceptance by the directors of the company, and that this certification was made; but in my opinion the question to which I have referred is not removed by these facts. A question—a substantial question—still remains; and that, as I have said, requires the withholding of my approval. There is, too, at least room to doubt whether the power conferred, in terms, by the act of 1889, "to become security upon any writ of error or appeal," extends to cases in this court. The language, "any court of this commonwealth," may be understood to restrict the power to cases in the courts of Pennsylvania. This subject, however, was not discussed by counsel, and I express no opinion with respect to it. The motion to approve surety is denied.

RIDGELY v. CONEWAGO IRON CO.

(Circuit Court, E. D. Pennsylvania. January 31, 1893.)

No. 22.

MINES AND MINING—LEASE—CONSTRUCTION—ROYALTY.

A mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposes no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises has become exhausted.

At Law. Action by Margaretta S. Ridgely against the Conewago Iron Company for breach of a mining lease. Rule for judgment for want of a sufficient affidavit of defense. Discharged.

S. S. Hollingsworth and Henry N. Paul, for rule.

H. M. North, for defendant.

DALLAS, Circuit Judge. This action is brought by the lessor against the lessee, upon a lease under seal, dated December 24, 1885, of "the exclusive right to mine iron ore" on a tract of land in the state of Maryland for the term of ten years. The lease contains this covenant:

"The party of the second part [the lessee] agrees to pay fifty-five cents per ton for every ton of 2,240 pounds of iron ore mined and taken away under this lease, accounts to be rendered and payments to be made monthly, on the 15th day of each month; and the party of the second part agrees and guaranties to take out at least 4,000 tons per year, or, failing to take out that quantity, to pay for the same, with the understanding, however, that if, in any one year, the party of the second part shall have paid for more ore than it has taken out during that year, it shall have the privilege of making up the amount in any subsequent year of this lease."

The breach assigned is that, during the five years last past, the defendant has failed to take out and pay for at least 4,000 tons of iron ore per year. The affidavit admits this, but avers that the defendant has taken out and paid for all the ore which was in the demised premises, and that by reason of its exhaustion it has not been possible, during the said five years, to take out any greater quantity than has in fact been taken out and fully paid for.

Mining leases commonly include, in addition to the usual undertaking to pay for what may be actually mined, a covenant that some fixed or ascertainable sum, at least, shall be annually paid. These covenants are not all the same, or to the same effect. They may be divided into two classes: First, those which require the payment of rent irrespective of produce; second, those which require that, upon failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid. Where the covenant is of the first class the tenant is liable for the rent, even if nothing could be got by mining. *Marquis of Bute v. Thompson*, 13 Mees. & W. 487; *Phillips v. Jones*, 9 Sim. 519; *Jervis v. Tomkinson*, 1 Hurl. & N. 195; *Bamford v. Lehigh Co.*, 33 Fed. Rep. 677. Where the covenant is of the second class his obligation is to pay for the stipulated quantity,