

is a provision for taxation which applies alike to resident and non-resident companies, and is therefore unlike the provision construed in *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037. Since it is applicable to all companies, it does not violate the constitution, as being, in effect, an imposition upon the interstate commerce. It is also just and reasonable. *Delaware Railroad Tax Case*, 18 Wall. 208; *State Railroad Tax Cases*, 92 U. S. 575, 607; *W. U. Tel. Co. v. Attorney General*, 125 U. S. 530, 8 Sup. Ct. Rep. 961; and *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876. While the statute defining the manner in which the tax shall be levied, to wit, that there shall be levied a tax within this state only upon that proportion of the valuation of the cars which results from comparing the miles traversed within this state with the aggregate of miles traversed within and without the state, is binding upon the complainant, it is binding also upon the taxing officers.

It was submitted to the court as to what was the meaning of the assessment roll,—i. e. in what manner the tax had been levied,—whether upon entire property of the value of \$100,000, or upon a portion or percentage of property whose value was such that the portion or percentage taxed was that amount. The sum \$100,000 is put down as the value of cars, etc. Furthermore, the value to be taxed is placed in the column where cars, carriages, and vehicles of all kinds are placed, and not in the column under the head of "trackage within this parish of railroads within this state, or partly within this state and another state." I think that the tax was assessed upon the entire value of all the cars of the complainant, and not upon them in the ratio of miles, as required by the statute. My conclusion is that the injunction *pendente lite* should issue.

GARES v. NORTHWEST NAT. BUILDING, L. & I. ASS'N.

(Circuit Court, D. Oregon. September 14, 1892.)

No. 1,947.

MANDAMUS—JURISDICTION OF FEDERAL COURTS.

The United States circuit courts have no jurisdiction to issue writs of mandamus, even when, by the law of the state where the court sits, mandamus is regarded as a civil action, except in cases where the writ is ancillary to some other proceedings. *Rosenbaum v. Bauer*, 7 Sup. Ct. Rep. 633, 120 U. S. 450, followed.

Suit for mandamus, brought by T. M. Gares against the Northwest National Building, Loan & Investment Association, to compel defendant to hold a stockholders' meeting for the election of a board of directors. Defendant demurs. Demurrer sustained.

G. H. Gorman, for petitioner.
C. B. Bellinger, for respondent.

GILBERT, Circuit Judge. This is a suit for a mandamus to compel the defendant corporation to hold a stockholders' meeting for

the election of a board of directors. A demurrer to the petition raises the question of the jurisdiction of this court to issue the writ. It has been repeatedly decided by the supreme court that the circuit courts of the United States are not authorized to issue writs of mandamus in original proceedings, or otherwise than as necessary to the exercise of their respective jurisdictions. *McIntire v. Wood*, 7 Cranch, 504; *Bath Co. v. Amy*, 13 Wall. 244; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. Rep. 633. These decisions are based upon the ground that the eleventh section of the judiciary act of 1789, which confers upon the circuit courts jurisdiction of all suits of a civil nature, at common law and in equity, between a citizen of the state where the suit is brought and a citizen of another state, does not include the proceeding for mandamus, which is neither an action at law nor a suit in equity, and this construction is held to be further supported by the language of the fourteenth section, which gives to the circuit courts power to issue "writs of scire facias, habeas corpus, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," thereby expressly limiting the power to issue the writ of mandamus to cases where it may be necessary for the exercise of a jurisdiction otherwise conferred by the act.

It is urged on behalf of the petitioner that this construction was adopted upon the theory that the writ of mandamus is here, as at common law, a prerogative writ, and it is contended that the reason of the rule does not exist in Oregon, where, by statute, the proceeding for mandamus is made a suit between private parties for the redress of private wrongs, and therefore becomes a suit of a private nature, at common law or in equity, within the language of section 11 of the judiciary act. The same contention was made in the case of *Rosenbaum v. Bauer*, *supra*, and the attention of the court was there expressly directed to the fact that in California, where that suit arose, the writ of mandamus was not prerogative, but on the contrary, by the adjudications of the state courts, had uniformly been held to be a civil action. Notwithstanding this fact, and the argument thereupon based, the majority of the court adhered to the rule previously followed, and refused to consider the proceeding for mandamus a suit of a civil nature, at common law or in equity. It must be regarded, therefore, the settled rule that the United States circuit courts have no authority to issue writs of mandamus except as ancillary to some other proceeding which shall have established a demand, or reduced it to judgment, in which case the mandamus may issue in the nature of process for executing the judgment, or otherwise for the enforcement of rights sought to be protected in the suit. The demurrer is sustained.

WILSON v. TOOTLE.

(Circuit Court, W. D. Missouri, St. Joseph Division. April 17, 1893.)

1. DEATH BY WRONGFUL ACT—ACTION BY APPOINTEE OF COURT—JURISDICTION.

Act Mo. April 20, 1891, provides that a cause of action accruing by virtue of the laws of another state "may be brought in any of the courts of this state by the person or persons entitled to the proceeds of such cause of action: provided, such person or persons shall be authorized to bring such action by the laws of the state when the cause of action accrued;" and that if the beneficiaries of such action are not allowed, by the laws of such state, to prosecute the action in their own names, the same may be prosecuted by a person to be appointed by the Missouri court in which the action is sought to be instituted. *Held*, that where a cause of action for death by wrongful act accrued in Minnesota, by whose laws the right of action is given to the personal representative for the benefit of the widow and next of kin, an appointee of the Missouri court could not maintain an action therein; for, as the right of action was given in contravention of the common law, and was dependent alone upon the statute creating it, the right must be taken with the limitations placed upon the remedy, and it was therefore not competent for the Missouri legislature to authorize any one to bring the suit other than the person designated by the Minnesota laws.

2. SAME—ACTION BY FOREIGN ADMINISTRATOR—TRUSTEES.

The administrator appointed in Minnesota, where the cause of action accrued, could maintain a suit in the Missouri court, notwithstanding the general rule that an administrator cannot sue in his official capacity without taking out letters of administration in the state where the action is brought; for the cause of action was vested in him, not in his character of administrator, but merely as the trustee of an express trust in favor of the widow and next of kin.

At Law. Action by James F. Wilson, administrator of William J. Kelly, deceased, against Milton Tootle, Jr., to recover damages for death by wrongful act. On demurrer to the petition. Overruled.

Statement by PHILIPS, District Judge:

This is on demurrer to the petition. The petition, in substance, alleges that on the 16th day of August, 1889, William J. Kelly died, intestate, in the state of Minnesota; that his death resulted from the wrongful act and negligence of the defendant, committed in said state; that thereafter, in September, 1889, the plaintiff was duly appointed administrator of the estate of said decedent by the probate court of the domicile of the deceased in said state, and that said administrator duly qualified, etc.; and that the plaintiff is a resident of said state, and the defendant is a resident of the state of Missouri. This suit is to recover damages in the sum of \$10,000 for the death of said Kelly, to the use of the father and mother of said deceased, who are his sole heirs. The petition also states that plaintiff had been appointed by the clerk of the circuit court of the United States for the St. Joseph division of the western district of Missouri, in vacation, to institute and prosecute this action; that said appointment was so made pursuant to an act of the legislature of the state of Missouri, approved April 20, 1891. To this petition the defendant demurs on the ground, principally, that the plaintiff cannot maintain this action in this jurisdiction.

Hall & Pike, for plaintiff.

H. K. White, for defendant.

PHILIPS, District Judge, (after stating the facts.) In the case of Vawter v. Railway Co., 84 Mo. 679, the supreme court of this