

thorize a claim for poundage by a sheriff of the state. By the Code, as formerly by the Revised Statutes, (2 Rev. St. p. 645, § 38,) a sheriff is entitled to poundage only upon the amount collected by virtue of the execution, except where a settlement is made between the parties after levy, when the poundage is upon the value of the property levied upon, not exceeding the sum at which settlement is made. It is the settled construction of these provisions by the highest court of the state that the right to poundage depends upon the collection of the execution, and is not created by any services rendered in executing the process previously. *Campbell v. Cothran*, 56 N. Y. 279; *Flack v. State*, 95 N. Y. 471. In the latter case the court of appeals, speaking of the change introduced in the pre-existing law by section 38 of the Revised Statutes, say that the right to poundage is "thereby made to turn upon the performance by the sheriff of the final act to be done in the course of the service of the execution." The case of *Scott v. Shaw*, cited in behalf of the marshal's claim, (13 Johns. 378,) is not in point, because it arose when the state statute gave poundage as a part of the fees for the service of the execution, and not, as now, upon the collection of the execution. If the marshal had been prevented from collecting the execution by the interference of the plaintiff or his attorney with the course of enforcing the process, undoubtedly he would be entitled to compensation for the poundage he would have otherwise earned. This is not such a case, but it is one where an execution, which was irregularly issued by the plaintiff's attorney, was vacated after a levy by an order of the court. Such a case is within the spirit, and fairly within the meaning, of the provision of the Code, which authorizes the court having control of the process to allow the officer compensation for his trouble and expenses in taking care of and preserving property where execution is stayed after a levy.

The order appealed from, so far as it affirms the marshal's claim for poundage, is erroneous. So far as it allows him the other fees charged, it is correct. It is for the circuit court, and not for this court, to determine whether an allowance should be made to the marshal for his trouble and expenses in taking care of and preserving the property.

The order is reversed, with costs, and with instructions to the court below to make such further order as of right and justice should be made.

DENVER, U. & P. R. CO. v. PORTER.

DENARGO LAND CO. v. SAME.

(Circuit Court, D. Colorado. October 31, 1893.)

Nos. 2,658 and 2,659.

LIMITATION OF ACTIONS—VACANT LANDS—PAYMENT OF TAXES.

The running of the Colorado statute of limitations relating to payment of taxes on unoccupied land under color of title is interrupted by the entry of another thereon under color of title, although such payments are continued to the full term named in the statute.

At Law. These were two actions brought against James R. Porter by the Denver, Utah & Pacific Railroad Company and the Denargo Land Company, respectively, to recover certain lands. The cases were consolidated for trial, and a verdict was rendered for plaintiffs. Defendant now moves for a new trial. Granted.

Edward O. Wolcott and J. F. Vail, for plaintiffs.
B. F. Montgomery, for defendant.

THOMAS, District Judge. The Colorado statute on which the second cause of action in each complaint is based reads as follows:

"Whenever a person having color of title, either by pre-emption or otherwise, as aforesaid, made in good faith to vacant and unoccupied land or mining claims, shall pay all taxes legally assessed thereon, or for improvements situate thereon, for five successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied lands or mining claims, to the extent and according to the purport of his or her proper title or pre-emption. All persons holding under such taxpayer, by purchase, devise or descent, before said five years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of the taxes for the term aforesaid, shall be entitled to the benefit of this section." Gen. St. § 2187.

The court charged the jury on the second cause of action alleged in the complaint as follows:

"I instruct you that, as a matter of law, the deeds in evidence are such as to give color of title to the plaintiff in this case, under this statute, for the land in controversy; and the questions for you to consider under this section are whether the plaintiff, so having color of title, did in good faith suppose that it had title, and did pay all taxes legally assessed upon the premises for five successive years prior to the commencement of this suit, to wit, May 16, 1891, and did at some time prior to said date, in some manner, enter into or take possession of the premises. The taxes paid by those under whom plaintiff claims title are to be considered in this connection as if paid by the plaintiff; and if you find that the plaintiff, or those under whom it claims title, did so pay taxes for five successive years, and did in good faith suppose that it or they had title to the premises, and did at some date prior to the institution of this suit, May 16, 1891, in some manner, take possession of the premises, then your verdict must be for the plaintiff."

The defendant duly excepted to the same. The charge ignored the fact that the defendant went into possession in March, 1890, and continued in possession of some part of the premises, at least. I think the court committed prejudicial error in thus charging the jury. Hill and his grantees under color of title did not pay taxes for five years prior to the commencement of this action on vacant and unoccupied land, for the defendant went into possession before the five years expired. The statute on which the second cause of action in the complaints is based, in my opinion, means that the payment of taxes under color of title must be made on vacant and unoccupied lands for the full term named in the statute, and that the entry into possession by the defendant under claim and color of title stopped the running of the statute. In addition to this, important and difficult questions of fact were submitted to the jury, requiring a reasonable time to examine the exhibits, and consider

and compare the evidence, and arrive at a safe conclusion; yet the jury rendered a verdict in both cases in less than half an hour.

After careful review of the cases and the record submitted, I think substantial justice demands that a new trial be had in both cases; and it is so ordered.

SWIFT et al. v. PHILADELPHIA & R. R. CO. SAME v. CENTRAL VT. R. CO. SAME v. DELAWARE, L. & W. R. CO. SAME v. FITCHBURG R. CO. SAME v. NEW YORK, C. & ST. L. R. CO.¹

(Circuit Court, N. D. Illinois. November 27, 1893.)

1. CARRIERS OF GOODS — UNREASONABLE CHARGES — INTERSTATE COMMERCE—COMMON LAW.

The common-law rule forbidding common carriers from exacting unreasonable charges does not apply to interstate commerce, even when the contract of carriage is made in a state where that rule prevails, since such commerce is governed solely by the laws of the United States, and the United States have never adopted the common law.

2. REMOVAL OF CAUSES—JURISDICTION—INTERSTATE COMMERCE ACT.

Federal courts have no jurisdiction, in suits removed from state courts on the ground of diverse citizenship, to enforce the provisions of the interstate commerce act, since in removed cases the jurisdiction of the federal courts is no wider than that of the courts in which the cases were begun.

At Law. On demurrer to declarations. Demurrers sustained.

E. Walker, Albert H. Veeder, and Mason B. Loomis, for complainants in all the cases.

John G. Milburn, S. E. Williamson, and Gregory, Booth & Harlan, for defendants Fitchburg R. Co., New York, C. & St. L. R. Co., and the Delaware, L. & W. R. Co.

Ullman & Hacker and Osborn & Lynde, for defendant Philadelphia & R. R. Co.

Schuyler & Kremer, for defendant Central Vt. R. Co.

GROSSCUP, District Judge. The declarations in these cases are substantially alike. The first three counts, with some variations, aver that the plaintiff is a corporation engaged in the business of shipping dressed beef and other provisions from the Union Stock Yards, in Chicago, to New York, Montreal, and other points in the eastern states and Canada; that after the 4th day of April, 1887, (the date the interstate commerce law went into effect,) and until April, 1888, the plaintiff, from time to time, delivered and the defendant accepted for transportation to such terminal points certain of its manufactured products; that the defendants were common carriers, engaged with other common carriers, in transporting continuously from Chicago to the eastern terminal points at certain rates established and then in force as the rate between such points; that the plaintiff was compelled to pay these defendants, according to the schedule rates, the sum of 65 cents per 100 pounds from Chicago to New York or Boston, and other rates in like proportion to other points; and that the rates so taken and exacted were

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.