section 2022, Rev. St. Mo. 1889; and, second, because the affidavit of such service made by the sheriff was not made before the clerk of the court, as required by the statute, but was made before a deputy. Murdock v. Hillyer, 45 Mo. App. 287. No such substituted service of process was authorized in this case, for the reason that it neither appears by the petition nor in any affidavit thereto that the defendant was a nonresident of the state, or out of the jurisdiction of the state circuit court, where the suit was instituted.

After the removal of the cause into this court, the case must proceed just as this court finds it when it is removed from the state court. Tallman v. Railroad Co., 45 Fed. 156. Nor is it apparent that on the petition, as it stands, this court could have any jurisdiction to afford the relief sought therein. To give the state court jurisdiction to proceed against the nonresident defendant upon substituted service, without the appearance of the defendant to the merits of the suit, the proceeding must be one essentially in rem. It may be conceded to the plaintiffs that in view of sections 2225–2227, Rev. St. Mo. 1889, an action for specific performance of a contract for the sale and conveyance of real estate may be so maintained, under the state statute, as a judgment therein may be enforced by directing the conveyance of the property, without requiring of the defendant the performance of any personal act. But for this statute, a suit for specific performance would partake essentially of the nature of a proceeding in personam. Olney v. Eaton, 66 Mo. 563–567; Bennett v. Fenton, 41 Fed. 283. What is the nature and object of this suit? It is predicated on a contract for the sale and purchase of real estate. By the terms of the contract, the defendant was to furnish to the plaintiffs a complete abstract of the title, and to convey to them a perfect title to the land. While the petition in this case is somewhat ambiguous, the gravamen of the complaint is that the deed to the land tendered by the defendant to the plaintiffs was imperfect in its title; that it did not describe the proper land; that the defendant has failed to furnish the abstract as provided in the contract; and that the plaintiffs were damaged in the sum of $1,000 by reason of having held in readiness the sum of $10,000 to be paid to the defendant upon his compliance with the contract; and the prayer of the petition is that defendant be decreed "to perfect title to said lands, and furnish an abstract, according to said contract, and to convey, by good and proper warranty deed, the said premises to plaintiffs, and that he pay plaintiffs damages in the sum of one thousand dollars, for the loss of the use of the purchase money of ten thousand dollars from the 24th day of January, 1896." It cannot be controverted that a decree or order of court directing the defendant to perfect title to the land, and to furnish an abstract of title thereto, as also an award of damages, as prayed for, would have to be executed personally against the defendant; and, while a decree of conveyance of title could be executed in rem, it is apparent from the whole body of the petition and the prayer thereof that plaintiffs do not seek to have this done except upon the condition that defendant first furnish the required abstract, and perfect his title to the land.

I have considered the question as to whether the bill does not contain sufficient facts to authorize the court to grant leave to the plaintiffs to file in this court an amended bill, averring sufficient title in defendant to compel him to execute the contract, or aver that plaintiffs are willing to accept such title as defendant has, in fulfillment of the contract, and pray for a specific performance, eliminating from the bill the averments and prayer respecting the failure to furnish the promised abstract, and the requirement that the defendant perfect his title, and also the prayer for damages. But the court is confronted with the legal difficulty that the state court from which this cause was removed had neither acquired jurisdiction over the defendant nor had it jurisdiction over the subject-matter of the relief prayed for in the bill, as against a nonresident defendant not appearing to the merits of the action. On the removal to this jurisdiction, the court must take the case precisely in the condition it was when the order of removal was made. The bill amended as above suggested would be res nova. The only way the defendant could be called into this court would be under the provisions of section 8, p. 176, 1 Supp. Rev. St. U. S., which applies to a suit "commenced in any circuit court of the United States." This would be, at best, an experimental and very questionable proceeding. It were better for plaintiffs to go out of court, and begin anew. As against this defendant, they should elect as to what remedy they will pursue. On the breach of such a contract, the vendee may elect to take the title the defendant has, and demand a specific performance, and pray for the conveyance; or he can sue at law for damages as for breach of contract. If the vendor has sufficient or any acceptable title to the vendee, where is the necessity for demanding of the vendor, through the court, a delivery of a completed abstract? It would be a novel procedure for a court of equity to decree that the vendor should deliver such an abstract. If the vendee, by the contract, be entitled to the abstract, it is equally accessible to him, and he could have one made, and sue the vendor for damages.

The contention of plaintiffs' counsel that the appearance of defendant in the state court, for the purpose of removing the cause into this court, is an appearance to the merits of the case, is not tenable. The motion to dismiss, filed in the state court by defendant, expressly stated that it was an appearance only for the purposes of said motion; and it was also expressly stated in the petition for removal that defendant appeared specially and solely for the purposes of such removal. This brings the case within the decision of the supreme court in Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, and was not an appearance to the merits. It results that the motion to dismiss is sustained.

LOUISVILLE, N. A. & C. RY. CO. v. POPE.

(Circuit Court of Appeals, Seventh Circuit. June 12, 1897.)

No. 263.

RAILROAD CONSTRUCTION CONTRACT—INTERPRETATION.

In 1873 the D. R. R. Co., a corporation of Indiana, authorized to build a railroad in that state, and the A. R. R. Co., an Illinois corporation, authorized to build a railroad in that state, entered into a contract by which the D. Co. made over to the A. Co. certain donations made to it for the purpose of building its road, and agreed that the road and all property of the D. Co. should belong to the A. Co. for the purpose of building such road upon condition that the A. Co. should begin construction before a certain date, and thereafter prosecute the same in good faith with such diligence as lay in its power, providing also that the principal condition of the ownership of the A. Co. was the commencement and prosecution of the work of building the road. The A. Co. began the work of construction, and carried it on for a time, expending a considerable sum of money, though this was not shown to be more than the donations to the D. Co., and then discontinued work for want of means to carry it on. In September, 1877, the D. Co., assuming that the A. Co. had failed to prosecute the work, let the contract for completing the road to independent contractors, by whom it was completed, and put in operation. *Held*, that the A. Co., by its agreement with the D. Co., was bound to prosecute the work, not only diligently, according to its ability, but at all events; and, it having ceased work, though from lack of ability to prosecute it, the D. Co. was justified in assuming possession of the road, and contracting with others for its completion, and the A. Co. had no lien on the completed road, or on the part where its work was done, for the amount of its expenditure upon it.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Chicago & South Atlantic Railroad Company was organized September 1, 1873, under the general railroad incorporation law of Illinois, approved March 1, 1872. Its proposed capital stock was $3,500,000, divided into shares of $100 each. To this capital stock only a nominal subscription was ever made. It is stated in the argument for appellant, and apparently not disputed in that for appellee, that the total amount of stock subscribed was eight shares. In September, 1872, the Indianapolis, Delphi & Chicago Railroad Company was formed under the act of March 11, 1867, of the legislature of Indiana, to declare abandoned certain unfinished railroads, and to provide for their completion, etc. This company succeeded to the rights of a prior and abandoned corporation of the same name. Its capital stock was $2,500,000, divided into shares of $50 each. Its corporate purpose was to build and operate a railroad from Indianapolis, by way of Delphi, a distance of some 140 miles, to a point on the boundary line between Illinois and Indiana in the county of Lake in the latter state, and in the direction of Chicago. The number of shares originally subscribed to the capital stock of this company was 1,068. Just how many were afterwards subscribed, and what was paid for the same, or agreed to be paid, does not clearly appear in the record. On September 5, 1873, these two corporations made a treaty in words following:

"Whereas, the Indianapolis, Delphi & Chicago Railroad Company is a corporation duly organized and existing under the laws of the state of Indiana, and thereby duly authorized to construct and operate a railroad extending from a point on the dividing line between the states of Indiana and Illinois at or near Lake county, Indiana, to Indianapolis, Indiana, commencing at Indianapolis, and extending through or within eighty rods of the following points, to wit, Big Springs Meeting House, Boone county; Kirkland, Frankfort, and Rossville, Clinton county; Delphi, Carroll county; Monticello, White county; and Renssalaer, in Jasper county. Said railroad is intended to pass

into or through the counties of Marion, Hamilton, Boone, Clinton, Carroll, White, Jasper (probably Newton), and Lake (counties); and thence on a route to be chosen by the said corporation to such a point on said county line between said states as may be most practicable; and is also empowered by the laws of the state of Indiana to construct, operate, and maintain an extension of its railroad from any point on the line thereof to any point on the line of the Chicago & South Atlantic Railroad in the state of Illinois. And whereas, the said Chicago & South Atlantic Railroad is a corporation duly chartered, organized, and existing under and by virtue of the state of Illinois, and for the purpose of building and operating a railroad from the city of Chicago, in the state of Illinois, to a point on the boundary line between the states of Illinois and Indiana, and to be hereafter located so as to connect with the terminus of the road of the said Indianapolis, Delphi & Chicago Railroad Company. And whereas, said roads are to be built in the line of and as parts of a railway to be known as the Chicago & South Atlantic Railroad, which said railroad is to be built on a uniform gauge of four feet and eight and one-half inches (4 feet 8½ inches) in a line as near as may be as follows, to wit: Commencing at Chicago, Illinois, in the most direct route practicable over and upon the road of the Chicago & South Atlantic Company to connect with the road of the Indianapolis, Delphi & Chicago Railroad Company on the line dividing the states of Illinois and Indiana, between the counties of Cook, Illinois, and Lake, Indiana; thence to Monticello; thence to Delphi; thence to Frankfort; thence to Indianapolis, over the routes of said Indianapolis, Delphi & Chicago Railroad Company; thence to Shelbyville; thence to Greensburg; thence to the Ohio river, at Vevay, or Rising Sun; thence crossing the Ohio river to Kentucky; thence to Frankfort or Lexington; thence to Loudon or some point near; thence by either or by both by direct route to Knoxville, Tennessee; thence to the Blue Ridge road to headwaters of the Savannah river to Anderson, in the state of South Carolina, or by the route from Loudon, or some point near it, to some point near the Cumberland Gap; and thence to Asheville, in the state of North Carolina, the objective points being Wilmington, North Carolina, Charleston and Port Royal, or Foote's Point, South Carolina, and Augusta and Savannah in Georgia. And whereas, the said Indianapolis, Delphi & Chicago Railroad Company is incorporated as a railroad company, and has been, and now is, obtaining, and is hereafter to obtain, subscriptions and donations for the purpose of building, maintaining, and operating said company: Now, therefore, the said Indianapolis, Delphi & Chicago Railroad Company and the said Chicago & South Atlantic Railroad Company, for the purpose of making the said Indianapolis, Delphi & Chicago Railroad Company a portion of the Chicago & South Atlantic Railroad Company, and for the purpose of securing an early commencement and completion of the work of building and operating said railroad company, do hereby make and enter into the following arrangements and agreements, to wit: (1) The Indianapolis, Delphi & Chicago Railroad Company, with all its property, franchises, and privileges, shall from this day be operated, controlled, and absolutely owned in fee simple by the Chicago & South Atlantic Railroad Company aforesaid as a portion of the grand route from the city of Chicago to the South Atlantic Ocean, upon condition, nevertheless, that the said Chicago & South Atlantic Railroad Company, or their agents or assignee, shall on or before the first day of July, 1874, commence the construction of said Indianapolis, Delphi & Chicago Railroad within the state of Indiana, and shall thereafter prosecute the building of the same in good faith with such diligence as lies in their power until said Indianapolis, Delphi & Chicago Railroad shall be completed. (2) All moneys, lands, stocks, bonds, and other things of value that have been and shall hereafter be contributed, donated, or subscribed by any state, county, city, community, corporation, or individual for the purpose of constructing or maintaining the said Indianapolis, Delphi & Chicago Railroad shall from henceforth belong to and be absolutely owned by the Chicago & South Atlantic Railroad Company aforesaid, or their assignees, subject, however, to such provisions and conditions as shall hereafter be set forth, and to the laws of the state of Indiana, and the Indianapolis, Delphi & Chicago Railroad Company heretofore enacted. The principal condition of the ownership of said things of value by the Chicago & South Atlantic Railroad Company

is fully understood and agreed to be the commencement and prosecution of the work of building the Indianapolis, Delphi & Chicago Railroad by the said Chicago & South Atlantic Company, their agents or assignees, and (in order to more fully secure both parties to this contract, and also the donors and subscribers mentioned) it is hereby agreed that the proceeds of all such subscriptions and donations shall in all cases where it is practicable be deposited in trust with Drexel & Co., bankers of Philadelphia, or George C. Smith & Bro., bankers in the city of Chicago, and in such local banks as may be mutually agreed upon by the Chicago & South Atlantic Railroad Company, their agents or assignees, and the party or corporation making the donation or subscription. All such donations or subscriptions shall thus remain as a special deposit in trust with said banks, until such time as hereafter stated, to wit, whenever and so soon as the Chicago & South Atlantic Railroad Company shall establish the fact (by the sworn statements of their engineers and contractors) that they have by their agents or assignees performed work upon the said Indianapolis, Delphi & Chicago Railroad to the value of ($50,000.00) fifty thousand dollars, then the Chicago & South Atlantic Railroad shall have the authority and right to draw (through the proper officers of their company) the sum of forty-five thousand dollars ($45,000.00), and for one hundred thousand dollars' worth of work they shall have the right to claim and own the sum of ninety thousand dollars, and so own for any other specified amount of work; it being the herein-declared intention to prescribe and agree that the Chicago & South Atlantic Railroad Company, or their assignees, shall be entitled and have the right to draw on the above-mentioned deposits, and on all donations and subscriptions of said Indianapolis, Delphi & Chicago Railroad Company, to the extent of ninety thousand dollars, and so for any specified amount of work; it being the herein-declared intention to prescribe and agree that the Chicago & South Atlantic Railroad Company, or their assigns, shall be entitled to have the right to draw on the above-mentioned deposits, and on all donations and subscriptions to said Indianapolis, Delphi & Chicago Railroad Company to the extent of ninety per centum of the value of all the work actually performed by them; and that such donations and subscriptions shall not be obtained under any other conditions, or for any other purpose, and the said Chicago & South Atlantic Railroad Company shall have the right to thus draw upon and own all the donations and subscriptions above mentioned until the entire amount shall have been paid over to the said company on the terms and conditions above mentioned. The details and specific arrangements of making such donations and subscriptions to be hereafter agreed upon in such manner as shall not conflict with the existing laws, and shall best protect the interests of both the subscribers thereof, and those of the Chicago & South Atlantic Railroad Company. Should the work of building the said Indianapolis, Delphi & Chicago Railroad not be commenced by the said Chicago & South Atlantic Railroad Company, their agents or assignees, on or before the first day of July, 1874, then this agreement shall be null and void, and of no effect, and all the subscriptions and donations deposited in trust with the banks as above set forth shall be returned by the said banks to the respective owners or subscribers thereof."

On February 3, 1875, a supplemental compact was made between the two companies in words following:

"Whereas, the Indianapolis, Delphi & Chicago Railroad Company and the Chicago & South Atlantic Railroad Company did by certain articles in writing made and executed between them on the 5th day of September, 1873, but not a consolidation, agree, among other things, that if the Chicago & South Atlantic Railroad Company should well and faithfully perform on its part all the matters and things mentioned in said contract to be performed by said company, then the said Indianapolis, Delphi & Chicago Railroad Company, its stock and donations, became the property of the Chicago & South Atlantic Railroad Company; and whereas there are divers omissions and insufficiencies in said articles in writing: Therefore, we, the Indianapolis, Delphi & Chicago Railroad Company and the Chicago & South Atlantic Railroad Company, do make these further articles of contract, and for union and consolidation to take place in futuro, not in præsenti, according to the act of the respective legislatures of the states of Indiana and Illinois, in such case made and provided: First. That the said corporations above named, by force

and virtue of said original article of writing, and by force of these presents, are hereby associated, but not consolidated, for the purpose of jointly promoting the building and running of their respective roads, shall assume a common name, and after the first day of July next shall be known under the name and style of the Chicago & South Atlantic Railroad Company, but nevertheless all the estate, real, personal, mixed, and the rights, privileges, and immunities, together with the stocks belonging to each of the said corporations, shall become vested in the Chicago & South Atlantic Railroad Company of the state of Illinois from September 5, 1873, and the debts and liabilities of each of said corporations shall be deemed and are hereby declared to be the debts and liabilities of the last-named body corporate. Second. All the capital stock of the said Indianapolis, Delphi & Chicago Railroad Company shall be held by the board of directors of said company for the use of the Chicago & South Atlantic Railroad Company of Illinois, and for such purpose shall be held in trust for the board of directors of the said last-mentioned company, to be held by them and their successors in office, or by such other persons as the board of directors of said company may from time to time direct, for the use of said company, and subject to the said control and management, direction, disposition, sale, and disposal of the said board of directors of said last-mentioned company: provided, nevertheless, the stock of the Indianapolis, Delphi & Chicago Railroad Company now out in the hands of subscribers and bona fide holders, or which shall thereafter be issued to counties, townships, municipal corporations, or individuals, shall be entitled to share pro rata in all dividends hereafter made and declared by the Chicago & South Atlantic Railroad Company of Illinois. Third. The board of directors and officers of the Indianapolis, Delphi & Chicago Railroad Company, or their duly-elected successors, shall continue in office for the purpose of preserving and guarding the trusts created in the articles of agreement, and for such other purposes as shall necessarily grow out of or be incident to their respective offices, until such time as said railroad shall be completed, and trains operated upon the same. But the capital stock and business and property of whatever name and kind of said associated company shall be managed and controlled exclusively by the board of directors of the Chicago & South Atlantic Railroad Company of the state of Illinois, and the said directors and all the officers shall be elected and appointed in the manner now provided for by the charter and by-laws of the last-named company. Fourth. From and after the first day of July next all regulations and by-laws now existing, or which may hereafter be established by the said Chicago & South Atlantic Railroad Company of Illinois, which do not contravene any of the stipulations of the agreements, and all rules and regulations necessary for the management and control of the business of the said company shall be and remain in force over the interests hereby to be hereafter consolidated and united as fully as if the same had been established or put in force by either of said companies prior to these articles of agreement. Fifth. All subsidies, public or private, all rights of way now obtained in the name of the Indianapolis, Delphi & Chicago Railroad Company, shall become and now are the property of the Chicago & South Atlantic Railroad Company of Illinois, and all municipal, county, or township subscriptions and other subsidies which are now pending, but not completed, and all judicial and other proceedings now pending for obtaining lands and the rights of way over the same by the Indianapolis, Delphi & Chicago Railroad Company shall be carried on, and said stock shall be issued by said company, in the name of the Indianapolis, Delphi & Chicago Railroad Company to all intents and purposes the same as if this association had not taken place until the same be fully terminated; and in all cases where any municipal subscriptions are made to the capital stock of the said road said stock shall be issued by said road, but the same shall be carried on for the use and benefit of the Chicago & South Atlantic Railroad of Illinois. Sixth. It is also agreed and made obligatory upon the Chicago & South Atlantic Railroad Company to establish the car-repair works in or near the city of Delphi, and to maintain them there, provided said company shall receive a donation in fee simple of not less than (25) twenty-five acres of land in or near said city, suitable for such purpose. Seventh. So much in said original articles in writing as refer to depositing moneys in trust with Drexel & Company of Philadelphia, or Geo. C. Smith &

Co., is hereby declared inoperative, and of no effect. The original articles in writing are to be in no way canceled or annulled by these supplementary articles, but the same are hereby ratified and confirmed in every respect. Eighth. Nothing contained in the articles above written shall be so construed as to be a consolidation or surrender of the franchises of said roads, or either of them, but the said roads are each to preserve their integrity, independence, and identity the same as if no such contract had been made; the true meaning and intent of these presents being that the Chicago & South Atlantic Railroad Company of Illinois are to be the owners of such stock of the Indianapolis, Delphi & Chicago Railroad as had not been sold or subscribed for up to the 5th of September, 1873, together with all its property, real, personal, and mixed, for the purposes hereinbefore expressed, and the Chicago & South Atlantic Railroad Company is to carry on all the business of building, equipping, and operating said road, and at such time, and not until then, as said road is built, and cars running over the same from Chicago to Indianapolis, and then and thereafter the said roads shall be consolidated and united as one corporation, and the Indianapolis, Delphi & Chicago Railroad shall be incorporated with and become merged in the Chicago & South Atlantic Railroad Company of Illinois, and the board of directors and officers of the last-named company shall constitute the directors and officers of said consolidated company. Ninth. And the said parties hereto, for the consideration aforesaid, do mutually agree and declare that the stipulations herein shall take effect immediately upon the due execution of the present articles."

Shortly after September 5, 1873, the work of constructing the road was commenced, and for a time carried on under the administration of the Chicago & South Atlantic Railroad Company pursuant to the contract. On September 29, 1877, the directors of the Delphi Company, assuming as a fact that the Chicago & South Atlantic Company had failed to prosecute the work of building the road in Indiana, in effect declared that the last-named corporation had no further interest or right in the unfinished road, and shortly after let a contract to complete the construction. The contractors, Yeoman, Hegler & Co., at once proceeded with this work. Later their contract was assigned to Yeoman, and afterwards by the latter to a corporation called the Chicago & Indianapolis Air-Line Railway Company. The work of construction was at length finished, the contractors and their assignees treating the unfinished road, upon which construction was resumed as here stated, as the property of the Delphi Company, and disregarding or ignoring any claim or right therein on the part of the Chicago & South Atlantic. About the time of making the contract with Yeoman, Hegler & Co., the Delphi Company mortgaged the entire property to secure bonds. These bonds were subsequently purchased for value by the Chicago & Indianapolis Air-Line Company, and afterwards this mortgage was foreclosed, and the road sold. Later appellant became the owner, and the road is now in use by appellant as part of its line.

On May 14, 1880, one John B. Pettit filed a creditors' bill against the Chicago & South Atlantic Railroad Company in the circuit court of the United States for the Northern district of Illinois. On December 31, 1880, appellee, Pope, was made receiver of, and to him later was assigned, all the property of the defendant in the last-named suit. On July 12, 1881, the bill in the case at bar wherein appellant and a number of other corporations and individuals were made parties defendant was filed. After divers amendments, answers, replications, etc., the cause was referred to a special master. On his report, and in accordance with his recommendation, a decree was entered, wherein it is adjudged that appellee receiver, in right of the Chicago & South Atlantic Railroad Company, has a lien on the road from Dyer, in Lake county, Ind., to Delphi, in Carroll county, to secure the sum of $168,922.88 as justly due the company last named, with interest thereon at 6 per cent. per annum from the 4th day of March, 1881; and that, unless that sum be paid by a day fixed, the portion of the road referred to be sold. From this decree, appellant, the Louisville, New Albany & Chicago Railway Company, alone prosecutes this appeal.

On September 5, 1873, the date of the first of the two writings set forth in this statement, the Delphi Company had not commenced the work of constructing its road, but it had acquired certain rights of way; and certain subscriptions, for payment of which it held notes, had been made. After the

initial agreement with the Chicago & South Atlantic, these notes and subscriptions were, according to the seventh finding of the master, canceled, and other or new notes and subscriptions substituted in their place. Shortly after September 5, 1873, the Chicago & South Atlantic surveyed or resurveyed the proposed road from Indianapolis to Dyer; and in June, 1874, grading was commenced in Lake county. Under the direction and control of the Chicago & South Atlantic and its contractors, the construction went on quite continuously in the counties of Lake, Jasper, White, and Carroll until the work, including "rights of way paid for and covered by said work," and including surveying and engineering, amounted in value, as estimated by the master in his nineteenth finding, to $168,922.88. The thirty-second finding shows that this work—identified in the nineteenth finding as having been "twenty-three miles of grading, grubbing, and bridging of said railroad in Lake county, about six miles in Jasper county, one mile in White county, and nine miles in Carroll county"—was all done some time prior to September 1, 1875. The master states that other work was done by the Chicago & South Atlantic, but he apparently failed to identify the same, and the total value of the work or unfinished road for which he found the Chicago & South Atlantic was entitled to recover, as fixed by him, was the $168,922.88, with interest, as above mentioned.

The theory of the special master—and his view was adopted by the circuit court—was that any cessation in the prosecution of the work of building the road in Indiana prior to September 29, 1877, was due, not to any want of diligence on the part of the Chicago & South Atlantic Railroad Company, but to inability, caused in a measure by the stringency of the times; that there never was any intent by the Chicago & South Atlantic to abandon the work of building the road; that the action of the Delphi Company in resuming active control and letting the work to its own contractors was wrongful as against the Chicago & South Atlantic; that the unfinished road, as seized by the Delphi Company and its contractors, was still the property of the Chicago & South Atlantic by force of the contract; that appellant and all persons and corporations dealing with the property after September 29, 1877, had or were charged with notice of the rights of the Chicago & South Atlantic Railroad Company; and that appellee, as receiver in right of the Chicago & South Atlantic, was entitled to the recovery and lien already mentioned. Further reference to the report and evidence will be found in the opinion.

E. C. Field, Henry W. Blodgett, Addison C. Harris, and George W. Kretzinger, for appellant.

John S. Miller and William P. Fishbach, for appellee.

Before BROWN, Circuit Justice, and JENKINS and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Appellee, being receiver, represents, in a sense, the creditors of the Chicago & South Atlantic Railroad Company. The sum recovered, $168,922.88, with interest, as allowed, now amounts to more than $312,000. This money, or a large part thereof, would doubtless be used by the receiver in discharge of the debts of the Chicago & South Atlantic Railroad Company. But it is the right of the company which is in question. No creditor is here asserting any lien in his own right; nor is it anywhere intimated as a theory of the case that certain creditors had liens in their own right, and that by a species of subrogation the debtor company may, in this proceeding, assert such liens. As the record comes before this court, the creditors have no right which transcends that of the company. If there were no creditors, and the purpose were to divide the large sum mentioned above among the few persons who made the trifling

subscription to the stock of the Chicago & South Atlantic, the question of recovery here would be precisely the same as it is. The people of Indiana along the proposed route were much interested in the enterprise which formed the subject-matter of the contracts of 1873 and 1875. By the laws of that state they, in the form of municipal corporations, were empowered to make donations, subsidies, and subscriptions in aid of the franchise granted to the Delphi Company to build the road. Individual property owners could, of course, make such donations as they saw fit. It was hardly expected that any municipal or other subscription to the stock of the Delphi Company would yield direct profit. The scheme evidently was to solicit and obtain donations, subsidies, and subscriptions, and use the same, or the proceeds thereof, in the work of initial construction, and then use the unfinished road as the basis of credit to secure means for completion. The appeal for municipal aid, it was evidently thought, would meet with a more liberal response if the road to be built in Indiana could be represented as part of a continuous line from Chicago to the South Atlantic seaboard; hence the organization of the Chicago & South Atlantic Railroad Company, and the compact between the two corporations shown by the writings of 1873 and 1875. The Chicago & South Atlantic was at liberty, of course, to provide means out of its own proper resources to be used in the construction of the road from the Indiana state line to Indianapolis, but no engagement to do so distinctly appears in either writing. Whether it was possible for the Delphi Company to alienate the franchise to build the road, that company did not do so. Section 8 of the writing of 1875 is explicit upon the point. The liberty and authority of the Chicago & South Atlantic to build the road in Indiana, and solicit, accept, and use in construction work in Indiana donations, subsidies, and subscriptions from property owners and municipal corporations along the route in that state, must be referred to the contract with the Delphi Company. All such donations, subsidies, and subscriptions, together with the stock of the Delphi Company undisposed of at the time of the execution of the writing of 1873, and all other property of the Delphi Company then on hand, was by the contract made subject to a special or limited ownership in the Chicago & South Atlantic. Since all construction work in Indiana was under the Delphi Company's franchise, and would otherwise have been without legal sanction, all donations, subsidies, and aids volunteered towards the work in Indiana, whether before or pending the contract, must have been initially the property of the Delphi Company. It was by force of the contract that these "things of value" were subject to the dominion of the Chicago & South Atlantic Railroad Company. That this was the understanding is apparent more particularly from the last sentence of the first paragraph of the preamble to the treaty of 1873, from the sections marked 1 and 2 of that same writing and from sections 5 and 8 of the writing of 1875. The section, for instance, marked 2 of the paper of 1873 in part reads:

"All moneys, lands, stocks, bonds, and other things of value that have been and shall hereafter be contributed, donated, or subscribed by any state,

county, city, community, corporation, or individual for the purpose of constructing or maintaining the Indianapolis, Delphi & Chicago Railroad shall from henceforth belong to, and be absolutely owned by, the Chicago & South Atlantic Railroad Company, subject, however," etc.

The Indianapolis, Delphi & Chicago Railroad is the road from Indianapolis to the state line, which the Indianapolis, Delphi & Chicago Railroad Company was authorized to build. That company, retaining its franchise to so build, and being deemed, held, and by necessary implication declared, the owner initially of everything given in aid of said franchise, transfers a limited and special dominion over all the "things of value" referred to in the contract as then extant or in expectancy to the Chicago & South Atlantic. It may be here added that profit as to a contractor or in any other way to the Chicago & South Atlantic was not stipulated for or proposed. When, under the administration of that company, the road should be completed, and cars running from Indianapolis to Chicago, the two corporations were to merge into a third, and the entire property was to vest in the consolidated concern. By the third section of the writing of 1875 the directors and officers of the Delphi Company and their successors "shall continue in office for the purpose of preserving and guarding the trusts created in the articles of agreement." By the eighth section of the same writing, after the idea of a surrender or alienation of its franchise by the Delphi Company is excluded, "the true meaning and intent of" the contract is declared to be that the Chicago & South Atlantic shall be owner of the property of the Delphi Company "for the purposes hereinbefore expressed"; that is, to carry on the work of building the Indiana portion of the road in question. In the preamble to the writing of 1873 it is recited that the Delphi Company "has been and now is obtaining, and is hereafter to obtain, subscriptions and donations for the purpose of building" the road in Indiana; and the immediate purpose of the contract is expressed to be "an early commencement and completion of the work of building" the road. The property alienated or put in the dominion of the Chicago & South Atlantic by the contract was, as before noted, all the property which the Delphi Company then had, or which might, pending the contract, be given or subscribed by any person or corporation in aid of its franchise to build the road.

The limitations fixed in the contract on the ownership thus vested in the Chicago & South Atlantic appear to be three in number, and to be limitations in time. Such ownership commenced when the writing of 1873 was executed. It would cease, apparently, first, if the work of construction were not commenced on or before the 1st day of July, 1874; again, if the work were not thereafter prosecuted,—that is, followed up or carried on with substantial continuity; and again, if diligence by the Chicago & South Atlantic in such prosecution should not be commensurate with the means for the time being available. These limitations seem to be set down, the first and third in the section marked 1; the other, in the section marked 2 of the writing of 1873. The learned counsel for appellee does not identify the second of these limitations. He reads in the contract only the

first and third, and he insists that the cessation in the work of construction prior to September 29, 1877, if there were any substantial cessation, was due, not to any want of diligence on the part of the Chicago & South Atlantic Company, but to inability for want of means. It would, of course, follow on this view that a cessation, however indefinite in time, if due to inability, would leave the ownership of the unfinished road in the Chicago & South Atlantic; that the Delphi Company, while liable to lose its charter if it did not build the road, and morally bound that construction work done with means given by Indiana people should, in case of need to forward the work, be a basis of credit, has yet made a contract which, in a contingency not unlikely to happen, would leave the unfinished road in possession of a foreign corporation unable to proceed with the work, and yet in a position, by reason of such inability, to demand in cash the value of what had been done, before the Delphi or any person or corporation succeeding to the rights of the Delphi could go on with the work to completion. The adjudication in the circuit court was, and the contention here, in effect, is, that the Chicago & South Atlantic had to be paid the full value of the unfinished road, even though every dollar used in construction had been given by Indiana people, and even though the Chicago & South Atlantic had neither furnished out of its own resources, nor become liable out of its own resources for, any labor or material which had entered into the construction. This holding and contention would be sound if we take the contract to mean that the limitation on the ownership vested in the Chicago & South Atlantic was only a want of diligence, and not a failure to prosecute the work, due to inability rather than to want of diligence. By the section marked 1 of the writing of 1873 the ownership transferred to the Chicago & South Atlantic is "upon condition that the Chicago & South Atlantic Railroad Company * * * shall on or before the 1st day of July, 1874, commence the construction of the" road in Indiana, "and shall thereafter prosecute the building of the same in good faith with such diligence as lies in their power until said" road "shall be completed." By the section marked 2 all property or "things of value that have been and shall hereafter be contributed, donated, or subscribed for the purpose of constructing" the road in Indiana "shall * * * be absolutely owned by the Chicago & South Atlantic Railroad Company, subject, however, * * * to the laws of the state of Indiana and the Indianapolis, Delphi & Chicago Railroad Company," —meaning, apparently, subject to any obligation or condition imposed by law on the last-named company,—and also subject "to such provisions and conditions as shall be hereafter set forth." Then follow the words: "The principal condition of ownership of said things of value by the Chicago & South Atlantic Railroad Company is fully understood and agreed to be the commencement and prosecution of the work of building" the road in Indiana. The Delphi Company, as already suggested, was subject to loss of its charter and franchise to build the road if the work of construction were not commenced and prosecuted. The primary and immediate purpose of the contract was the "early commencement and completion of the

work of building." Dominion over all property at the date of the first writing owned by the Delphi Company, or afterwards contributed in aid of its franchise, was turned over to the Chicago & South Atlantic, not as beneficial owner, but for the purpose mentioned. If the Chicago & South Atlantic did not commence the work of construction before the 1st of July, 1874, or if it did not thereafter use in carrying on the work the degree of diligence specified, or if for want of ability or means it ceased to carry on the work,—in any one of these contingencies its dominion or ownership over the things of value comprehended in the contract was to lapse or expire. The prosecution of the work of building the road in Indiana is one thing; diligence in such prosecution commensurate with the means at hand for the time being is another. Prosecution of the work might go on without cessation, but the degree of diligence in such prosecution might be inadequate and out of proportion to the means and instrumentalities available. The purpose here was an early commencement and completion of the work. The language of the contract expresses both conditions. They are not inconsistent. The Chicago & South Atlantic was expected out of its own proper resources to build the road from the Indiana state line to Chicago. It might also quite possibly build and complete the road in Indiana without other means than what was transferred to it by the contract with the Delphi Company. The Chicago & South Atlantic was privileged to pledge the unfinished road in Indiana, but such pledge would, of course, be subject to the conditions under which that company held that property. The Chicago & South Atlantic was also privileged to provide means out of its own resources to complete the work. When completed, the compensation would come in the shape of a beneficial ownership vested in the consolidated corporation. But the failure of the Chicago & South Atlantic to prosecute the work, and its loss on that account of the special dominion given by the contract over the "things of value" therein mentioned and the construction work done with said "things of value," did not necessarily entail pecuniary loss on the Chicago & South Atlantic Company. There was no engagement by the Delphi Company that the "things of value" turned over to the Chicago & South Atlantic would be sufficient to build the road. The risk of failure to prosecute the work, and of the loss on that account of that ownership which was transferred to it by the contract, was left with the Chicago & South Atlantic.

The master states in his report that the seizure or resumption of active control by the Delphi Company in the fall of 1877 "rendered the completion of the road by the Chicago & South Atlantic impossible if it were otherwise able to have completed its construction." He says also that the Chicago & South Atlantic Railroad Company was in 1880, "and had been for some years, without means to complete said road, yet the purpose to build said road had not been abandoned, and efforts were made by said road from time to time to raise means with which to prosecute the enterprise." The total value, so far as the master saw fit or was able to compute, of the construction work done under the administration of the Chi-

cago & South Atlantic, and for which that company was, according to the master, entitled to recover, was $168,922.88. This construction work, as stated in the nineteenth finding, "consisted of about 23 miles of grading, grubbing, and bridging of said railroad in Lake county, about 6 miles in Jasper county, 1 mile in White county, and 9 miles in Carroll county." This estimate included also engineering and surveying and "rights of way paid for and covered by said work." From what the master says in the two paragraphs of the thirty-second finding, this work must have been all done prior to the 1st day of September, 1875. On September 29, 1877, the directors of the Delphi Company declared that contract relations with the Chicago & South Atlantic were at an end, and on October 2, 1877, three days later, the Delphi Company let a contract for completion of the road to Yeoman, Hegler & Co.; and these contractors thereupon commenced work on the unfinished road. This action of the Delphi Company at once became known to the officers of the Chicago & South Atlantic. The statement by the master that "the purpose" on the part of the latter company "to build the road had not been abandoned" is immaterial. Intent, one way or another, on the matter of abandonment, was not fixed in the contract as a limitation on the ownership thereby vested in the Chicago & South Atlantic. But this finding by the master is hardly warranted. From the correspondence between the officers of the Chicago & South Atlantic, and from statements made by officers of the latter company to a committee of inquiry sent by the Delphi Company prior to September 29, 1877, and from other matters shown in evidence, the better conclusion would have been that the purpose or expectation of building the road under the contract was, in fact, given up, or at least had become secondary to another policy, namely, to claim ownership over the unfinished road for whatever advantage might result to the Chicago & South Atlantic, its stockholders and creditors. But it is not here meant that this claim was not in good faith. It was made on a construction of the contract evidently deemed sound and defensible. The contractors, Yeoman, Hegler & Co., commenced, and for a year or more carried on, their construction work on that part of the road which lay in White and Carroll counties. Active work under their contract was not resumed in Lake county until later. The conclusion of the master is that the part of the road in Lake county was not "seized" until work was so resumed thereon. He states, in general terms, that the Chicago & South Atlantic did some work on this part of the road after October 4, 1877. He says:

"In November, 1878, lumber was provided by said road to construct a bridge over the Kankakee river to the state of Indiana, and some work was done in the fall of 1878 in Lake county, and some ties were delivered at that time in said county to be used in said road, and ordered by said company."

This is apparently a prefatory statement to what follows:

"And until the appropriation of said part of said line of road as herein set forth in Lake county, the same was in the possession of the Chicago & South Atlantic Railroad Company, though such road was at that time, and had been for some years, without means to complete said road, yet the purpose

to build said road had not been abandoned, and efforts were made by said road from time to time to raise means with which to prosecute the enterprise."

The master does not indicate what the work last referred to was, nor does he give any value to the same, or to the ties or lumber, if any were in fact used. The purpose of the statement is apparently to signify an assertion of right persisted in up to that time by the managing agents of the Chicago & South Atlantic. On March 12, 1876, the president of the Chicago & South Atlantic wrote to the vice president:

"The work must be put under headway this spring, otherwise we will lose our subsidies and the moral effect. * * * Now you should by all means get the road under headway."

Other letters interchanged between the date last mentioned and October 4, 1877, indicate, as the status at the time, substantially a complete cessation of the work of construction. In response to a letter written October 3, 1877, by the president of the Chicago & South Atlantic detailing the action of the Delphi Company on September 29, 1877, and the letting of the contract by that company as before noted, the vice president wrote on October 4, 1877, "My advice is, simply protest and keep quiet." The contention by appellant that for more than two years prior to September 29, 1877, the work of building the road in Indiana had ceased, seems well made. The Chicago & South Atlantic was advised at once of the action taken by the Delphi Company based on the failure to prosecute the work. Whatever the former company afterwards did, if anything, in Lake county, was done with notice that the latter denied any ownership on the part of the former over any part of the road in Indiana.

It is said that the action of the Delphi Company on September 29, 1877, was a forfeiture; that the law abhors forfeitures; that time was not of the essence of the contract; and that there could be no forfeiture or rightful resumption of control by the Delphi without a formal request to the Chicago & South Atlantic to proceed, and a refusal after such request. But the contract declared that the prosecution of the work of building was a principal condition of "the ownership of said things of value by the Chicago & South Atlantic Railroad Company." The contract fixed a limitation upon whatever ownership or dominion vested by that instrument in the Chicago & South Atlantic over said "things of value," or the unfinished road so far as constructed with said "things of value." This ownership ceased by its own limitation. The case is not one of the forfeiture of an estate upon condition. It is an instance, rather, of a conditional limitation. The Delphi Company had to make sure as a fact of that cessation or failure to prosecute the work which by the contract limited the dominion of the Chicago & South Atlantic. In such event, there was no longer any ownership in the Chicago & South Atlantic to be displaced by re-entry. The contract made no provision for any demand or notice. The Chicago & South Atlantic was not prejudiced in any way by want of prior formal demand and notice. On the showing of the record, the un-

finished work had been neglected, and was falling into decay. There had long been nothing more, if anything, than a mere constructive possession in the Chicago & South Atlantic. Such a possession is fictitious. It ceases with the legal ownership. In 1876 a committee was sent by the Delphi Company to inquire of the officers of the Chicago & South Atlantic whether or not, and when, if at all, the Chicago & South Atlantic proposed to go on with the work. One Gould, a member of the committee, testified that at the interview between the representatives of the two companies the statement was distinctly made on behalf of the Delphi Company, in effect, that if the work were not speedily resumed, the latter company would displace the Chicago & South Atlantic, and itself resume exclusive and active control. The vice president of the Chicago & South Atlantic testified that he did not remember any declaration so strongly put on the occasion in question. The testimony of Gould was not otherwise disputed. It makes nothing upon the rights of these corporations, as defined in the contract, that after ownership thereunder by the Chicago & South Atlantic had ceased by limitation, the Delphi Company for a time might have been still willing that the Chicago & South Atlantic should take up the work again. The original bill and the amended bill each contains the following statement: "Your orator further shows that all subscriptions, bonds, subsidies, and assets of every kind and description obtained by the Chicago & South Atlantic Railroad Company, as stated in this bill, were obtained under and in pursuance of either the original agreement or supplemental agreement * * * or both of them,"—meaning the writings of 1873 and 1875. In other words, within the scope of the bill, the subject-matter contended about in this litigation is the property of the Delphi Company on hand when the writing of 1873 was executed, everything which was subsequently given, contributed, or subscribed in aid of the franchise to build the road in Indiana, which franchise always remained, as originally vested, in the Delphi Company, and all construction work done with the means aforesaid. The master found that some portion of the construction work included by him, as already stated in the valuation of $168,922.88, had not been paid for by the Chicago & South Atlantic. How much he does not state. He does not find any lien on this work in favor of any laborer or contractor or specify any sum as due to any one. He does not show any sum raised by the Chicago & South Atlantic for, or expended on, the work in Indiana, which did not come to that company by virtue of its contract with the Delphi. He shows that donations and subscriptions aggregating some $300,000 were made in Indiana pending the contract. He does not show that the $168,922.88 was in excess of the amount actually received by the Chicago & South Atlantic from such donations and subscriptions in Indiana. Moreover, the distinct and specific purpose of the bill, as already said, was to recover the "assets * * * obtained by the Chicago & South Atlantic Railroad Company under and in pursuance of either the original agreement or the supplemental agreement, * * * or both of them" (meaning the writings of 1873 and 1875); and the distinct ground of such re-