

are brought to recover. Subdivision 7 of section 7 provides: "Upon claims, whether in contract, or tort, or both, arising out of the same transaction or transactions connected with the same subject of action." The purpose of the Montana statute was to afford a remedy to a person who was deemed to have been injured by the wrongful conduct of the trustees in omitting to make a report. *Huntington v. Attrill* 146 U. S. 657, 13 Sup. Ct. 224. The statutory remedy of each existing creditor was an action ex delicto (*Stokes v. Stickney*, 96 N. Y. 323), and I assume that the assignee of these three claims acquired by the assignment the right to use the remedies of the respective assignors. The tort which is the foundation of the defendants' alleged liability was one and the same, and from that tort there is claimed to have resulted a liability to pay three debts, which the plaintiff now owns. While I cannot define exactly the scope of the word "transaction," as used in the seventh section of the practice act, I think that these three statutory claims arose out of the same transaction,—that is, the same neglect,—and that, being owned by one person, they can be grouped in one complaint. The definition of "transaction" in *Craft Refrigerating Mach. Co. v. Quinipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76, while it took its shape from a set of facts different from those in this complaint, is broad enough, when applied to the alleged facts in this case, to permit the union of these three causes of action in one complaint. The motion to amend is granted.

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SMITH v. RACKLIFFE, State Treasurer.

(Circuit Court, N. D. California. December 17, 1897.)

No. 11,915.

TAXATION OF RAILROAD — ROLLING STOCK OF LESSEE — POWERS OF BOARD OF EQUALIZATION.

Under Const. Cal. art. 13, § 10, providing that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization," such board has power to assess to a lessee rolling stock owned by it, and used in operating a leased line of road in more than one county of the state.

This is an action by C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company against Levi Rackliffe, state treasurer of California, to recover taxes paid by the company. Heard on demurrer to the amended bill. For former decision, see *Reinhart v. McDonald*, 76 Fed. 403.

C. N. Sterry (E. S. Pillsbury, of counsel), for plaintiff.

W. F. Fitzgerald, Cal. Atty. Gen., for defendant.

MORROW, Circuit Judge. This action was brought by the receiver of the Atlantic & Pacific Railroad Company, under the provisions of section 3669 of the Political Code of this state, to recover of the state treasurer certain moneys paid by that company into the state treasury for taxes upon rolling stock operated by it within this state. A demurrer to the original complaint having been sustained

by Judge McKenna (*Reinhart v. McDonald*, 76 Fed. 403), the complainant has filed an amended complaint, containing a formal substitution of parties, and some changes in the verbiage of the complaint, but no substantial change in the material allegations of the original complaint. It appears that the Atlantic & Pacific Railroad Company is a corporation organized and incorporated under the act of congress approved July 27, 1866 (14 Stat. 292). It had in operation, in 1893, a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the territory of New Mexico, through the territory of Arizona, to The Needles, in the county of San Bernardino, state of California; thence to Mojave, in the county of Kern, in the same state. The home and situs of the rolling stock of the road was located at Albuquerque, N. M. The line of this road in the state of California from Mojave to The Needles, a distance of about 243 miles, was built and is owned by the Southern Pacific Railroad Company. In August, 1894, the Southern Pacific Railroad Company agreed to sell this road from Mojave to The Needles to the Atlantic & Pacific Railroad Company. The sale was to be consummated whenever the Southern Pacific Railroad Company was able to make clear title to the line of railway discharged from certain liens. In the meantime, and until the consummation of the sale, and payment of the purchase price, the Southern Pacific Railroad Company leased this line of railway to the Atlantic & Pacific Railroad Company for a period of 30 years at an annual rental. The lease provided that the Atlantic & Pacific Railroad Company should promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part thereof, or might become in any wise due or owing in respect to the same. In the year 1893 the state board of equalization of this state assessed the franchise, roadway, roadbeds, rails, and rolling stock of the Southern Pacific Railroad Company in the state of California, including the line of railroad from Mojave to The Needles, so leased to the Atlantic & Pacific Railroad Company, and which was, at that time, being operated by the last-named company, and did also demand and require of the Atlantic & Pacific Railroad Company that it should make a return of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from Mojave to The Needles, leased from the Southern Pacific Railroad Company, and thereupon, and under protest, the Atlantic & Pacific Railroad Company returned to the board of equalization that it had in operation 89 cars and locomotive engines, of the value of \$56,810, which it had in use and operated at times along the line of said road, and thereupon the board of equalization assessed said rolling stock at a total valuation of \$125,000, and imposed a tax of \$2,272.80, which the railroad company paid to the state treasurer. To recover this sum of \$2,272.80, the present suit was brought against the state treasurer by the receiver of the railroad company.

The first demurrer interposed by the attorney general of the state raised the question of jurisdiction of the court to entertain the action, because it was, in effect, a suit against the state of California. The demurrer also placed in issue the sufficiency of the complaint in

stating a cause of action. The court held that it had jurisdiction of the action, but sustained the demurrer on the other ground. The sufficiency of the complaint involved the question whether, under section 3665 of the Political Code of California, the state board of equalization had the power to assess the rolling stock of a railroad corporation, where the corporation is not located in the state, and does not own the line of road upon which the rolling stock is used, but holds the road under a lease. The section provides, among other things, as follows:

"The board must assess the franchise, road-way, road-bed, rails and rolling-stock of all railroads operated in more than one county. \* \* \* Assessment must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way and all other property owned by such person, corporation or association of persons are assessed by the assessor of the county where they are situate."

It was contended that, as the Atlantic & Pacific Railroad Company was not the owner of the line of railroad from Mojave to The Needles, the rolling stock on that road could not be assessed to that corporation. In other words, there must be a union in the ownership of the line of road and the rolling stock as a condition of assessment. The court held that the tax was legal under the constitution of the state, which provides, in section 1, art. 13, that "all property of the state, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law." In support of the present demurrer, it is contended that the state board of equalization had no jurisdiction, under the constitution of the state, to assess rolling stock belonging to a railroad which is not operated in more than one county of the state; that, if such rolling stock happens to be in the state under such circumstances as to require that it should be taxed under the constitution and the laws of the state, the taxes required to be paid by it must be levied upon an assessment made by the local assessor, and not by the state board of equalization. It is contended, further, that this proposition was not presented by counsel or considered by the court upon the first demurrer. The sufficiency of the complaint certainly involved this question, and, in my opinion, it was presented by counsel in their briefs. But, assuming that the question was not considered or determined by the court, I am of the opinion that the assessment is in accordance with the constitution and law of the state. Section 10 of article 13 of the constitution of the state provides:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails and rolling stock of all railroads operated in more than one county in this state, shall be assessed by the state board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Section 3665 of the Political Code, as we have seen, requires the board of equalization to assess rolling stock of railroads operated in more than one county, and the assessment must be made to the

corporation, person, or association of persons owning the same. This is an assessment against a railroad corporation on rolling stock operated by such corporation over a line of railroad in more than one county in the state, and, in my opinion, comes within the jurisdiction conferred upon the board of equalization by the constitution. The demurrer will be sustained.

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BACHELDOR v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 940.

PUBLIC LANDS—RAILROAD RIGHT OF WAY—TAKING TIMBER FROM ADJACENT LANDS.

Under the act of June 8, 1872 (17 Stat. 339), which authorizes the Denver & Rio Grande Railway Company to take timber and materials for construction purposes from the public lands "adjacent" to its line, the company is not confined to the townships through which the road runs, or those adjoining them; nor is the cutting of timber 25 miles from the road, in itself, as a matter of law, unlawful. The meaning of "adjacent" is a mixed question of law and fact for the jury, under proper instructions, and a proper test is whether the timber is within reasonable hauling distance by wagons. 48 Pac. 310, reversed.

In Error to the Supreme Court of the Territory of New Mexico.

Samuel L. Bachelder, the plaintiff in error, was indicted in the territorial court for the First judicial district of the territory of New Mexico, for unlawfully cutting certain timber on public lands in said territory. He justified the cutting and removal of the timber in question on the ground that he was an agent of the Denver & Rio Grande Railroad Company, and that the timber had been cut for the benefit of the railroad company, in pursuance of the provisions of an act of congress approved June 8, 1872 (17 Stat. 339, c. 354), which granted to the Denver & Rio Grande Railway Company, now the Denver & Rio Grande Railroad Company, a right of way over the public domain 100 feet in width on each side of the track, together with such public lands "adjacent" thereto as might be needed for depots, shops, and other buildings for railroad purposes, and authorized it "to take from the public lands adjacent thereto, stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph line." The evidence showed that the timber in question was cut from land 21½ miles distant from the line of the Denver & Rio Grande Railroad, or about 25 miles distant therefrom by wagon road, and that there was no timber, nearer than that which had been taken, on either side of that part of the road. On the trial of the case the lower court instructed the jury, in substance, that the word or term, "adjacent," as used and applied in the act of congress aforesaid, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the Denver & Rio Grande Railroad runs; that, when the public lands are unsurveyed, the word "adjacent" meant relatively the same thing, as to limit of distance from the line or right of way; and that the word "township," as used in the court's instruction, meant an area of land six miles in extent north, south, east, and west, and was a legal subdivision, according to the official surveys, under the laws of the United States. As the timber which had been cut by the defendant below was cut outside of the limit of distance from the right of way that was defined by the foregoing instruction, the defendant was convicted, and, on an appeal taken to the supreme court of New Mexico, the conviction was affirmed by a divided court. 48 Pac. 310. The case has been brought to this court by a writ of error issued to the supreme court of the territory.