

prayed and proper to be granted, as to have required a new summons before judgment by default or decree *pro confesso* could have been entered. It is not deemed necessary, however, to pass upon this point. It would be tedious to go into details; it is enough to say that the original complaint made Ives the principal party defendant, and sought and warranted only incidental relief against the petitioner; while the supplemental bill, abandoning all questions between the plaintiff and Ives, eliminates the latter from the case by averring that he acted for his co-defendant, the railroad company, only, and seeks against that company an accounting and other relief not prayed in the original bill against either defendant, and which under that bill could not have been obtained against the petitioner. The objection of illegibility has been removed by the filing of a substituted transcript.

In any view of the case, as it seems to me, the petition for removal ought to have been sustained, and the motion made here is therefore overruled.

CHATEAUGAY ORE & IRON Co. v. BLAKE.

(Circuit Court, S. D. New York. August 2, 1888.)

1. ERROR, WRIT OF—SUPERSEDEAS BOND—CONDITION.

A *supersedeas* bond, conditioned that the plaintiff in error "shall prosecute its writ of error to effect, and answer all damages and costs, if it shall fail to make the plea good," is sufficient.

2. SAME—EXECUTION BEFORE ENTRY OF JUDGMENT.

A *supersedeas* bond executed before the judgment was in fact entered, but not delivered until after its entry, is valid; but in order that it may not be open to question, leave will be given plaintiffs in error to execute a new bond *nunc pro tunc*.

On Writ of Error from District Court. Motion to dismiss writ for alleged insufficiency of *supersedeas* bond.

Chittenden, Townsend & Chittenden, for plaintiff.

Matthews & Smith, for defendant.

LACOMBE, J. I am informed by the clerk that the *supersedeas* bond is in the form in use in this circuit for many years. The condition, viz., that the plaintiff in error "shall prosecute its writ of error to effect, and answer all damages and costs, if it shall fail to make the plea good," is in the language of the 1000th section of the Revised Statutes, and sufficient. As to the objection that the bond is defective because it was executed before the judgment sought to be reviewed by the writ of error was in fact entered, I am also of the opinion that the bond is none the less a valid obligation to respond for failure to make good the writ of error in this suit, the bond not having been delivered till after entry of judgment. Inasmuch, however, as the obligors are not parties to this motion, and this decision will therefore not bind them, and the re-

spondent being entitled to a security which shall be open to no question, the plaintiffs in error should have a new bond executed and filed *nunc pro tunc*. This may be done within 10 days after entry of this order.

DREXEL *et al.* v. BERNEY *et al.*

(Circuit Court, S. D. New York. August 11, 1888.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—JURISDICTION—ESTOPPEL—ACQUIESCENCE.

An executrix who is also a legatee, who permits her co-executor to take out letters of administration in a state where the testator was not domiciled at the time of his death, and where there were no assets situated, and to appoint an agent to manage the estate, and who recognizes the agency and acts with the agent in the management, and accepts payment of a portion of her legacy, is estopped, so far as her interest in the estate is concerned, to assert that such letters, and a power of attorney thereunder appointing the agent, are void.¹

In Equity. Bill to restrain prosecution of common-law action.

Wayne MacVeagh and C. E. Tracy, for complainants.

Geo. Deforest Lord, for defendants.

WALLACE, J. The complainants bring this suit to restrain the prosecution of a common-law action brought against them in this court by Louise Berney, as executrix of the will of Robert Berney, deceased, for an alleged conversion of \$200,000 of United States registered bonds, and to enjoin the plaintiff from disputing in that action the validity of proceedings in Alabama for the probate of the will of said Robert Berney, and of letters testamentary thereon issued to one James Berney as executor, and of a power of attorney executed by him to one St. James, with whose agents complainants dealt in the transaction respecting the bonds which constitutes the alleged conversion. The theory of the bill is that the defendants are equitably estopped from disputing the validity of the probate of the will, the letters testamentary issued thereon to James Berney as executor, and the power of attorney to St. James.

Briefly stated, the case alleged by the complainants is, in substance, as follows:

"Robert Berney died at Paris, France, in November, 1874, leaving a will, whereby his widow, Louise Berney, his brother, James Berney, and one St. James were appointed executors, and legacies were given. One of the executors, James Berney, procured the probate of the will in Alabama in February, 1875, upon the representation that the testator was at the time of his death domiciled there, and thereupon letters testamentary were issued to the said James Berney as executor. The other executors named in the will as-

¹On the subject of estoppel by conduct, and by acquiescence, see *Marrow v. Brinkley*, (Va.) 6 S. E. Rep. 605, and note; *Oil Co. v. Perry*, (Ala.) 4 South. Rep. 635; *Koopman v. Blodgett*, (Mich.) 38 N. W. Rep. 649, and note.