

No. 12051

Supreme Court of Illinois

People, ex. rel. H.L.Brush

vs.

Wells

71641  7

Of the June Term of the Supreme Court
Of the State of Illinois A.D. 1857.

To the Hon General H. Heat Chief Justice of
the said Court and his Associates now
in Session.

The Petition of Henry L. Bush
of Ottawa in the County of LaSalle in the
State of Illinois respectfully represents.

That on the 9th day of January A.D. 1836
the General Assembly of the State of Illinois
passed an act entitled "An act for the Con-
struction of the Illinois and Michigan Canal,"

By which said act in the 7th Section thereof it was

Canal laws

317-

Sec. 7.

Sec. 8.

Sec 10

Among other things provided, "That the Governor of
this State by and with the advice of the Senate
shall appoint three practical and skillful citizens
of this State to be known by the style and des-
cription of "The board of Commissioners of the
Illinois and Michigan Canal," as by reference to
the said act will appear, which said board of
Commissioners were by the 10th Section of said
act "constituted a body politic and corporate
with full power and authority in their corporate
name to contract and be contracted with sue
and be sued defend and be defended, plead and
be impleaded in all the matters and things re-
lating to them as Canal Commissioners,";

To hold their offices until the first Monday
in January 1837; and thereafter to be bi-enni-
ally appointed in such manner as the Legis-
lature might from time to time direct

That said Commissioners were duly appointed and qualified according to the provisions of the act aforesaid and as such entered upon and continued to exercise the duties of their offices until the Election and appointment of their successors.

That on the 2nd day of March A.D. 1837 the General Assembly of the State of Illinois passed an act entitled "An act to amend an act Entitled an act for the Construction of the Illinois and Michigan Canal approved Jan. 9th 1836" providing among other things for the Election at that then Session of the General Assembly by Joint Vote of both houses of their practical and skilful citizens of this State to constitute the board of Commissioners of the Illinois and Michigan Canal, as by reference to the said act will fully appear.

That said Commissioners were also in due form of law Elected and qualified and entered upon and continued to perform the several duties of their said Offices until their successors were duly elected and qualified. That among other things in said act it was required by the 8th Section thereof that "the said Commissioners shall construct a navigable feeder from the best practicable point on Fox River to the Illinois and Michigan Canal at the town of Ottawa. &c." as by reference to said Section of said act will fully appear.

That by the act of the General Assembly entitled "An act to amend the several laws in relation

Canal Laws

P 24.

Sec. 1.

Canal Laws

P 25.

Sec. 8.

to the Illinois and Michigan Canal. Approved
Laws 1839 February 26. 1839. in the 16th Section of the said
P. 181. act it is further in substance provided that
Sec. 16. each Judge of a Circuit Court through which the
Canal passes shall appoint a board of assessors
for the purpose of appraising all damages which
might arise from the construction of the Illinois
and Michigan Canal according to the act of
the 2nd March 1837. before referred to, as by refer-
ence to the said act of February 26. 1839 will
fully appear.

That by an act of the said General
Assembly of the State of Illinois Approved February
Laws 1839- 1st 1840 It was further provided that "It shall
1840. P. 79 be the duty of the Commissioners when any person
Sec. 4 or persons claim damages that they may have
sustained by the construction of the Illinois and
Michigan Canal to settle with any such person
or persons for the damages they may have
received and pay the same,"; as by the 4th Sec-
tion of the said act which is entitled "an act
to amend the several laws in relation to the
Illinois and Michigan Canal will fully appear

That by virtue of the several acts before
referred to the board of Commissioners of the Illinois
Canal and Michigan Canal were ~~constituted~~ ^{be} designated
P. 24. Sec. 1. One of their number as President, One as Treasurer
P. 17. Sec. 7 and one as acting Commissioner of said board
which was done and the said several commis-
sioners continued to act in their said several
capacities thus designated until the appoint-
ment of the "Board of Trustees of the Illinois
and Michigan Canal," as hereafter stated

Laws 1842-3
p. 55.
Sec. 3.

That by the act of the said General Assembly
Approved February 21. 1843. entitled "An act
to provide for the completion of the Illinois
and Michigan Canal and for the payment
of the Canal debt," it read in substance
provided that there should be appointed
three discreet persons to be known by the style
and description of the "Board of Trustees
of the Illinois and Michigan Canal,"
who by the terms and conditions of said
act when appointed were to possess all
the powers and perform all the duties
conferred upon the board of Commissioners
of the Illinois and Michigan Canal by
the act of January 9th 1836 and the several
acts supplementary thereto as by reference
to said act will fully appear. That
the said "Board of Trustees of the Illinois
and Michigan Canal" were after the passage
of the said act duly appointed and quali-
fied and entered upon the duties of their
Office ~~and have since~~ ^{and have since} ~~performed~~
~~their duties~~ ^{and have since} continued to perform and ex-
ercise the duties of their said Office on
Appointment. That by the terms and condi-
tions of the said act one of the Trustees
was to be appointed by the Governor of
the State of Illinois and the other two
by the subscribers to a loan contemplated
to be made under said act for the purpose
of the completion of said Illinois Michigan
Canal, and that by the act aforesaid

Laws 1842-3
p. 55.
Sec. 3 -
p. 62, 52, 3.

Laws. 1842-31.
P. 57.
Sec. 10. Said State Trustee when appointed as
aforesaid was authorized and required
to settle all accounts due Contractors and
others (except for such damages as were other-
wise in said act provided for) by issuing
Certificates of indebtedness, for the sums
in manner prescribed in said act.

Laws. 1847
P. 22-3
Sec. 1-2 That by the terms and condi-
tions of a certain other act of the General
Assembly of this State entitled "an act to
authorize the bringing of suits against the
State Trustee of the Illinois & Michigan Canal"
It is provided in substance, That in all
cases when the Board of Commissioners
of the Illinois and Michigan Canal were
then in existence liable to be sued by any
person or Corporation, suits might be brought
and prosecuted against the "State Trustee
of the Illinois and Michigan Canal," by
that name and style; to be prosecuted
and defended in the same manner as
suits heretofore authorized against said
Board of Commissioners were prosecuted
and defended.

Laws. 1847
P. 32.
Sec. 1-2. That by another act of the
General Assembly of the said State of Illinois
Approved March 10. 1847 Entitled "an act
to limit the time for persons to bring claims
against the State of Illinois," It is provided
among other things that "the unliquidated
claims arising from the Canal shall all
be proved up by witnesses before the State
Trustee on said Canal, which shall ever

which shall embrace all the testimony relating to said Unliquidated ~~claims~~ claims, and no further testimony shall be allowed to be brought in to substantiate said Unliquidated claims after they are once filed as above, as by reference to the said act will fully appear.

And your Petitioners further state and shew to the Court, that by virtue of the several acts of assembly herein before referred to and by virtue of the laws of this State then and now in force the State Trustee of the Illinois and Michigan Canal was at the time of the presentation and proof of your Petitioners claim as hereinafter stated legally authorized and empowered to settle and adjust the same and duly authorized and required by law to issue a Certificate of Indebtedness for the same pursuant to the terms and conditions of the said act of the General Assembly approved February 21. 1843. before referred to.

Exhibits 1842-3

P. 57

Sec. 10.

p. 82, 82, 3.

And your Petitioner further States & Shews
to the Court that he is now and since
the 13th day of May A.D. 1837 has
been the owner in fee simple of the undivided
half of the — East half of the South East quar-
ter of Section two in Township Thirty three
North of Range two East of the third prin-
cipal Meridian in LaSalle County Illinois

That the said tract of land was ceded
and purchased of the United States at their
Land Office in St. Louis Mo. on the 27 day
of June A.D. 1835 by one John Bascom
as by the Certificate of the Register of the
Land Office (a copy of which is hereto attached
marked "A" and made part of this
Petition) will appear.

That the said John Bascom
on the 13th day of May A.D. 1837, by
his deed of that date (a copy whereof is
also hereto attached and made part
hereof) conveyed the said tract of land
to your Petitioner. By means whereof your
Petitioner then and there became owner
and still is the owner in fee simple of
the said tract of land.

And your Petitioner further
States and Shews to the Court that some
time in the year A.D. 1838 under
and by virtue of the authority conferred
conferred upon them by the several acts
of the General Assembly before referred to
and made and by virtue of other laws
of this State, the said Commissioners

Of the Illinois and Michigan Canal caused the Fox River feeder which is a portion of the said Illinois and Michigan

Canal to be constructed over a crop and through the said land before described in such manner as materially to injure damage, cut up and destroy the said land and the appurtenances, privileges, mines and coal vents belonging and appertaining; to the great damage and injury of your Petitioner

In Consideration of the premises your Petitioner made and by Virtue of the Court of this State before referred to on the 20th day of December A.D. 1848. Applied to Charles Oakley who was at that time State Trustee on the Illinois and Michigan Canal and presented under his oath his claim for damages done to said Land on account of the construction of the said Fox River feeder across the same, and then and there proved by the testimony of witnesses and the production of testimony and documents to the satisfaction of said State Trustee that he was the legal owner of the said land and that by the construction of the said Fox River feeder across the same he had sustained damages to the amount of Four thousand seven hundred and fifty dollars. and that the injury occasioned to ^{his} said land by the construction of said feeder amounted to that sum

And your Petitioner further states that
on the day and year last aforesaid
he did settle his said Claim for damages
Done to said land on account of the
Construction of said Levee with the
said Charles Oakley State Trustee as
aforesaid at the sum last before
stated and that the said Charles Oakley
State Trustee as aforesaid then and there
made out signed and delivered to him
the following Certificate of said Settlement

" State of Illinois;

Ladelle County Ills. I Charles Oakley
State Trustee of the

Illinois & Michigan Canal do Certify that
on the 20th day of December 1848. the above
named Henry L. Bush Claimant appeared
before me and adduced his title papers
and satisfactory evidence that he was
and is the owner of the said tract
of land and also satisfactory proof
that the said land had been injured
by the Construction of the said Levee
in the sum of Four thousand ~~and~~
Seven hundred & fifty dollars

Charles Oakley

State Trustee "

Your Petitioner refers to his said Appli-
cation and the proof in support of the
same herewith filed Marked. C. duly

duly certified by the Secretary of State as a copy from the files in his Office and makes the same Part of this Petition, and shews to the Court that the same together with the Certificate and Settlement of the State Trustee ~~to~~ and with him were filed in the Office of the Secretary of State before the first day of January A.D. 1849. (See read affidavit D)

Your Petitioner then further states that as he is advised and believes he is in consideration of the Premises and by force of the several acts and the laws of this State before referred to entitled to a Certificate of indebtedness on the part of the State to him for the amount so found due him upon said Settlement adjustment & proof made before & with the said State Trustee as aforesaid and particularly under the 10th Section of the act of the 21st day of February A.D. 1843.

And your Petitioner further states that the said Oakley State Trustee as aforesaid promised your Petitioner that he would make out and deliver such Certificate to him as soon as he could conveniently do so, and your Petitioner entertains no doubt the same would have been done had not the said Oakley become sick and died shortly after said Proof and Settlement was made and certified by him —

Louis 1842-3
P. 57.
Dec. 10

And your Petitioner further states that the
said Charles Oakley was at the time your
Petitioner made his said Proof Settlement &c and
up to the time of his death from that time
State Trustee on the Illinois & Michigan
Canal duly appointed Commissioner and
and qualified. That the said Oakley died
some time in the month of December 1848.

That after the death of the said
Charles Oakley to wit about the day
of February A.D. 1849 Joseph B. Mills was
duly appointed ~~Commissioner~~ Commissioner
and qualified State Trustee on the Illinois
and Michigan Canal and since that time
has been and still is acting State Trustee
on the said Illinois & Michigan Canal.

Your Petitioner further states that since
the death of the said Charles Oakley he
has caused repeated applications to be made
to the said Joseph B. Mills State Trustee
as aforesaid requesting him to make out
and issue to your Petitioner the Certificate of
indebtedness to which he is entitled under the
acts and laws before referred to; which the
said Joseph B. Mills having doubts about his
authority to do so, has hitherto refused and
still refuses.

Your Petitioner therefore Prays that a writ of
Alternative Mandamus may be issued out
of this Hon. Court directed to the said Joseph
B. Mills State Trustee on the Illinois and
Michigan Canal returnable to the President of
this Court commanding the said Joseph
B. Mills to appear at some day in said Term
and show cause if any he can why he
should not make execute and deliver to
your Petitioner a "Certificate of Indebtedness,"
in manner prescribed by law and the several
acts of the General Assembly before referred to
And that upon the final hearing of this
Petition the said Joseph B. Mills State Trustee
as aforesaid may be ordered & directed per-
emptorily by mandate of this Hon. Court
to make execute and deliver the said "Cer-
tificate of Indebtedness" to your Petitioner &
as in duty bound he will pray &c.

Henry L. Bush
By his atty

H. L. Bush

Henry L. Brush

vs

Joseph B. Wells
State Master of
the Illinois and
Michigan Canal

Petition for Mandamus

Filed June 22 1850
L.eland Ck.

"D"

State of Illinois

The People ex. re.
Henry L. Bush

In Supreme Court

The State Trustee
of Ill. & Mi. Canal

John P. A. Hors Shown

says that he was present at the taking of the proof and settlement of the claim of the Relator by the said Charles Oakley on the 20th day of December A.D. 1848. Deposed to in the petition herein, that George H. Norris Surveyor of LaSalle County Joseph D. Wagoner Deputy Surveyor, William Meddick & this Affiant were produced as witnesses by the Relator in support of his said claim.

That the said affidavit of the said Relator filed herein does not embody all of the testimony adduced by the Relator in support of his said claim.

That the material facts set forth in the said affidavit of the said Relator in support of his said claim were proven by one or all of the said witnesses above named.

That the affidavit of the Relator was not intended to embrace the proof as submitted but only a statement of the claim & the grounds upon which it was based to be filed in the office of the Secretary of State to avoid the running of the Statute of Limitations of March 1st 1847 against him. The

Declarator regarded his claim as
settled & liquidated by said Oakley
by his said Certificate & by his
said verbal promise to pay
the amount on his return from
Springfield made in the hearing of
this affiant at the time of giving said
certificate.
Subscribed & sworn to before John P. A. Hors
one Philip Smalley
Clk. Supreme Court

Amend the petition by inserting on page
two after the words "first day of January
1829" the following:
"And also to the affidavit herewith
"filed marked "I." also made part
"of this petition"

State of Illinois }
LaSalle County } In
The People ex rel Henry } Supreme Court
L. Bush vs }

Joseph B. Wells, State
Treasurer vs

John R. A. Hors

sworn says that on or about the 18th
day of September instant he served
a copy of the annexed affidavit
& motion to amend the petition
herein, on John M. Wilson Esq. the
Attorney for the Defendant. That since
said service this affiant has received
a letter from said Wilson requesting
the petitioner to proceed in the matter
& have said motion to amend
decided by the court forthwith.
Subscribed & sworn to before
me this 25th day of September 1880
J. L. Linsley, Clerk
LaSalle Co. Court

John R. A. Hors

Motion to Amend

The relator has leave to
amend his petition,
and the dependant
has leave to answer
the amended petition
by the 15th Oct. 1850.

Sept. 30th 1850.

S. H. Heat,
Solicitor

State Bonds of the
Michigan & Michigan Canal
and

add

People of the State of Illinois
ex rel. State of Illinois, & Bond

Supreme Court of the State
of Illinois Term 8, 1850
Mandamus

It is hereby stipulated that the Petitioner
may argue the above cases in writing
or otherwise before the said Court in vaca-
tion & that judgment may be entered as of
the Term Term 1850. The defendant submitting
the case on this point upon the written argument
filed in this cause. And by assenting to a
margin of the cases on the part of the Petitioner
if the case has already been argued.

August 14, 1850

John M. Wilson Atty for
State Bonds of Illinois and
Michigan Canal

We assent to this above
stipulation
Glenn & Cook
for Petitioner

Canal Trusts &c.

¹⁷
People for Birth

Stipulation

Filed Aug. 16, 1850.
Melan C. R.

Henry A. Birk

^{As}
The State Trustee of
the Illinois & Michigan
Canal

Sir

Take notice that
I intend to apply to the
Supreme Court of the
State, now in session
at Ottawa, for an alter-
native writ of mandamus
to compel you to pay
me the damage done
to the undivided $\frac{1}{4}$ of the
 $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ Sec^r 2 - T. 33
N. R. 3 E 3d P. M. as settled
& liquidated by your order
of 1st Oct. 1850. The
application will be made
on Monday the 17th inst
or as soon thereafter as
counsel can be heard.
When & where you may
appear & have cause to
contend if any you have

Ottawa

June 13th 1850

To ^{Joseph} B. Wells
State Trustee &c

State of Illinois,
Cook County ss) George W. Day Jr being duly sworn
deposes & says that he resides in Chicago, County
State aforesaid & that he duly served the within
notice upon Joseph B. Wells State Trustee or
on the 15th day of June 1860 - by delivering to
him a copy of the within & showing him the
original of said notice.

Subscribed & sworn to the 15th day of June 1860 before me } George W. Day Jr
Walter Kimball }
Clerk of the Court }
Circuit Court of Cook County }

Springfield Decr. 18th 1850.

De Sir,

I enclose you the opinion of the Court
in the case of The People ex rel, Bush
vs Wells, State Trustee. The judgment to be
entered in vacation pursuant to the
stipulation of the parties. Judge Catron
will return you the papers in the
case.

Very truly yours,

L. Leland. Esq.

Ottawa,

Illinois.

A. H. Treat.

P. S. You had better omit any entries
on the record till Judge Catron
returns home.

A. H. Treat.

$$\begin{array}{r} 12 \\ 36 \\ \hline 72 \\ 36 \\ \hline 432 \\ 9 \\ \hline 38880 \end{array}$$

Chicago Oct 14th 1850

Dear John Dean Cator

Dear Sir

I received a letter from Mr. Dean
Judge Pratt a few days since stating that the Relator
in the Motion of Brooks v. The Trustees &c had obtained
leave to amend his petition & that the Court had
also granted leave to the Respondent to answer
I have seen & examined the proposed amendment
& am satisfied that the Relator can obtain no
advantage by an answer & therefore decline making
a return to the writ as amended. But will do
now the Court to file the motion now on file
time pro sume (a new motion I mean) & that
the Court proceeds to decide the case upon the
motion to quash considering the motion as
now filed by leave of Court. Considering the
motion in the place of a demurrer at law I did
not suppose it was a motion under the rule
requiring special leave & omitted to ask leave
thereof. If you object to this mode of proceeding
your self please proceed without a motion
As the Court can not grant a mandamus unless
a case is made by the Relator the result would
be the same upon an ex parte hearing as upon
the motion I am therefore indifferent whether the
motion is filed or not. I am anxious that the

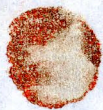
Matters be settled at the earliest convenience of the
Court. I am well how the good day to make the
notes for argument as short as can be done & give
them a reasonable time. As they have had since
July to prepare I suppose they must be nearly ready.
Mr. Shaw informs me some make dinner
that they are ready & request me to go ahead if
I had any thing to say.

With high consideration I remain
Yours John A. Wilson
Att'y for State Prison

P.S. I have read the above to the State Prisoners who
concur in the suggestions made -

J. M. Wilson

J. M. Nelson
Oct 17. 68



Don. Wm. Dean Baker
Attorney
Greenville Co.
Spartanburg



PAID



State of Illinois & SS.

Supreme Court $\frac{3}{4}$ The People of the State of Illinois
to Joseph B. Wells State Trustee on the
Illinois & Michigan Canal - Greeting:

Whereas it has been represented to the Hon. Samuel
H. Treat Chief Justice of the Supreme Court of said State
this Applicant, now in session at Ottawa in the third
Division thereof, by one Henry L. Brush, that you,
although repeatedly requested so to do, have hitherto
refused & still refuse to make out & issue to him a
Certificate of indebtedness for the sum of four thousand
seven hundred & fifty dollars, as by the several laws
of this State it is alleged you are required to do
as is particularly set forth in the Petition of the said
Brush now on file in ^{our} said Supreme Court.

We therefore being willing that due & speedy
justice be done to the said Henry L. Brush in this behalf,
command you, that immediately after the receipt
of this writ, you do, without further excuse or delay,
make out, execute & deliver to the said Brush the said
Certificate of indebtedness, or that, on or before the
28th day of June inst., you signify to ^{our} said Court, cause
to the contrary, lest in your default, complaint should
come to us repeated. And how you shall execute this
our command, certify to the justices of our said Supreme
Court, now sitting at Ottawa, together with this writ.

Witness, the Hon. Samuel H. Treat,
Chief Justice of our said Supreme
Court, at Ottawa, this 28th day
of June A.D. 1880. The Seal of said
L. Leland Clerk Sup. Court.

the compulsion of

IN

State of Illinois

Book County J. George W. Taylor being duly sworn deposes
that he resides in Chicago in said County. that on the 27th
day of June 1879 he duly received the within writ of mandamus
upon Joseph B. Wells. State Tax Collector. by delivery him a copy
of the same personally to the same town clerk. claiming him the
highest of justice & law.

Subscribed sworn this 27th day
of June 1879 before me }

Edmund J. Clark
Circuit Court }

George W. Taylor

83
The People ex. rel. &c.

vs
Joseph B. Wells &c.

Alternative Mandamus

do June Term 1880.

Filed July 2nd 1880.
J. Leland Clerk.

Henry L. Brush

vs

State Trustees of the
Illinois & Michigan Canal

Mandamus

By reference to the motion filed in this matter it will be seen that the authority of the State Trustee to settle claims for damages at the time stated is questioned.

The reasons for this position are that the act to limit the time for persons to bring claims against the State of Illinois approved March 1st 1847 (Sess Laws 1846-7 - p 32) includes claims against the Canal (see Sec 2) and by the first section it is evident that the legislature intended to arrange these claims themselves instead of leaving them to be settled as then provided by Law. So that future legislatures may know what unliquidated claims do exist against the State & the grounds upon which they are founded in the language of the act.

The only authority conferred upon the Trustee is to take testimony & certify the proceedings. (~~give to the claimant~~ the legislature or to the Secy of State) and nothing more. To construe this act as a cumulative act merely giving additional power to the State Trustee utterly defeats the object of the act as declared in the 1st Section.

If it was intended merely to prescribe the mode of proving claims & to leave in the State Trustees the power to settle as provided in the 10th Sec of the Act of Feby 21, 1843. (R Laws p. 610.) - then no claims would necessarily exist against the State after January 1, 1849, & these would be nothing for the Legislature to act upon.

It is therefore insisted that the act of March 1, 1847, repeals by implication the provision referred to in the 10th Sec of the act of Feby 21, 1843. -

2. The Certificate set forth in the Petition is evidently given under the 5th Section of the act of March 1st, & not as evidence of a settlement under the 10th Sec. of the Act of Feby 21, & therefore is no evidence of a settlement.

But it may be answered that by moving to quash we admit a settlement as stated in the Petition. Now admitting that the act of March 1st is cumulative, no evidence could be admitted to ascertain the claim but the evidence of witnesses - taken before the Trustees by the express language of the 2^d Sec of act of March 1st, hence the allegation of a settlement can only be proved by the evidence taken before the Trustees. if any such was taken. The objection then that no settlement was made is properly made by the motion - all the evidence to sustain the allegation

which can legally be introduced being before the Court.

A Motion to quash reaches every thing that is set forth in the writ. In this case, by reference the Petition and accompanying papers are made a part of the writ. 10 Barb 265

3. Admitting that the act of March 1st is cumulative and that by virtue of the Act of Feb'y 21, Charles Oakley as State Trustee had the right to settle this claim. - We object to the allowance of a mandamus because it does not appear by the writ & accompanying papers that he pursued the course pointed out by the act of March 1st and that if he settled at all it was without authority of law & the settlement is of no binding force upon his successor nor upon the State whose agent he was.

It was at most but a special power to be ~~executed~~ exercised in the manner pointed out by the Statute of which all were bound to take notice. And no principle is better established than that an agent cannot bind beyond the scope of his authority when the scope of his authority is known to the person with whom he deals. A man who acts under a public law cannot bind beyond the authority or in any ~~may~~ other way than as prescribed by law because all are bound to take notice of the provisions of the law

under which he acts 3 Term 1862. 2 Johns 48—

In the present case on the admission before made. for the sake of argument there is no such proof before the Court as is required by the 2^d Sec of the Act of March 1st. Nor allegation or evidence that such proof was taken. Hence no testimony of witnesses taken as provided.

And it appears from the certificate of the Secretary of State referred to & on file in this Cause that all the proceedings had before the Trustees were the filing of the petition of the Relator sworn to and the affidavit of J. V. A. Haes appended to the petition simply stating in substance that so far as he was advised the matters set forth in the petition were true.

It seems superfluous to add after this statement that such proof if it deserves the name of proof—is no compliance with the Act of March 1st

The only Witness if he can be called so is the Relator himself. the party in interest & who as such is incompetent as a Witness both in law & in Equity except when specially called upon and even then his statements are regarded as the admissions of a party rather than as the evidence of a Witness. So far as Mr Haes is concerned he stands in the position of an approver certifying to the amiability of the Relator & in fact swears to nothing as a Witness.

Doubtless the Legislature intended
by Mitrepa and testimony what is understood
by these terms technically -

There are various other causes assigned
under the Motion - but we do not deem
it necessary to enlarge upon them as
they can be made available hereafter
should the foregoing points be over-
ruled. If the Relator is, under the
law, entitled to the amount claimed.
The State Trustee has no desire to
deprive him of it for a moment
but having doubts in his own mind
upon the subject he has authorized
us as his Attorneys to submit this
matter to your Honor upon the
foregoing suggestions that by your
decision in the matter he may be
guided in like cases

Judd & Wilson -
Attys for Joseph B Wells - State
Trustee of Illinois & Michigan Canal

Proposed by H. G. Bush

State Prison at Concord
" "

Arguments of Defendant
Upon Motion to quash

John Jones

State of Illinois

Supreme Court of the
Jan 2 Term 1850

People ex relation

Henry & Bruck

Joseph B Wells

State Trustee &c

Madamus

And now comes Joseph B Wells
State Trustee of the Illinois & Michigan Canal
by said Wells his attorney & moves to quash
the writ herein -

1 Because it does not appear from
the Certificate of Charles Oakley set forth in
the petition referred to in said writ of Habeas
Corpus that any settlement was made by
said Oakley as Trustee, with said relation
in relation to the subject matter of said
petition

2 Because it does not appear from said
Certificate that the amount claimed by
said relation or any other amount was
allowed to said relation or that any
settlement was made between said Oakley
& said relation -

3 Because said Charles Oakley as
such Trustee by law, had no authority
to make any such settlement or agree-
ment as is in said petition alleged
4th

Because said Joseph B Wells Trustee of
of the Illinois & Michigan Canal as such
Trustee is not bound to carry into

Effect and agreement as is alleged in
said petition of the above named persons made
without authority of law.

It is because said petitioner has not by
his petition said writ or other writs
referred to in said writ shown him-
self entitled to the relief prayed.

Judge Wilson City of
Joseph B. Wells State Printer
of the Illinois & Michigan
Consolidated

Joseph B. Wells
H. A. Brundage
Joseph B. Wells & Co.
Or in Court
Motion to quash

Filed July 9. 1880.
J. L. and C. L.

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Opinion of the Court by Chief Justice Rogers

It was made the duty of the Canal Commissioners, by an act passed on the 2nd of March, 1837, to "construct a navigable feeder from the best practicable point on Fox river, to the Illinois and Michigan Canal, at the town of Ottawa," Acts of 1837, p. 41, S. B. By the 8th section of that act, and the 16th section of the "Act to amend the several laws in relation to the Illinois and Michigan Canal, approved, February 26th 1839, it was made the duty of the Circuit Judge of the Circuit Court of each county, through which the canal passed, to appoint a board of assessors, for the appraisement of all damages, which might arise from the construction of the Canal. The assessors were required to make a written report in each case to the Circuit Court, and, if the report was approved by the Court, an order was to be entered directing the commissioners to pay the damages awarded.

The 4th section of the "act to amend the several laws in relation to the Illinois and Michigan Canal", approved, February 18th 1840, declares; "It shall be the duty of the Commissioners, when any person or persons claim damages that they may have sustained, by the construction of the Illinois and Michigan Canal, to settle with any such person or persons, for the damages they may have received, and pay the same: Provided, if the Commissioners are of the opinion the claim is too high, and the claimant will not take a fair compensation, they shall call the appraisers as required in the act to which this is an amendment, and they shall proceed as required in said act".

By the provisions of the "Act to provide for the completion of the Illinois and Michigan Canal, and for the payment of the canal debt," approved, February 21st 1843, the canal and the unsold lands and lots belonging to the Canal, were granted to the "Board of trustees of the Illinois & Michigan Canal," as security for the payment of the loan authorized by that act. Two of the trustees were to be appointed by the subscribers to the loan, and the other by the state. The trustees were to possess all the powers, and perform all the duties imposed upon the Canal Commissioners by previous laws. Trustees were appointed to

whom the canal property was conveyed. The 20th section of that act, after exempting from the operation of the grant to the trustees, the lands and lots previously sold by the ^{Canal} Commissioners, provides, that the State trustee "is hereby authorized and required to settle all accounts due to contractors and others (except for such damages as are hereinafter provided for) by issuing certificates of indebtedness, which, together with the certificates of indebtedness, scrips and acceptances heretofore issued by the Canal Commissioners, shall be received by said trustee, or other officer or officers, in payment for said lots and lots, whenever they may be presented for that purpose". The exception, referred to in this section, embraced the prospective damages of contractors.

The "Act to authorize the bringing of suits against the State Trustee of the Illinois and Michigan Canal," approved, February, 28th 1847, provides, that in cases where individuals or corporations had a right, under the former laws of this state, or any of them, relating to the Illinois and Michigan Canal, to prosecute suits against the ~~board~~ of Commissioners of said canal, whilst said board was in existence, such individuals or corporations shall hereafter have the right to prosecute suits in all competent Courts of this state, against the "State trustee of the Illinois & Michigan Canal," by ~~their~~ name and style," and "judgments obtained against said trustee shall be of the same nature and have the same effect, as judgments heretofore rendered against said board of commissioners."

The 1st and 2nd sections of the "Act to limit the time to bring claims against the State of Illinois," approved March 1st 1847, are as follows. "Sec. 1. That all persons having unliquidated claims against the State of Illinois, from any cause whatever, shall make out all the vouchers, and present the claim, together with his own affidavit of the correctness of the same, previous to the first day of January, eighteen hundred and forty nine, and have the same filed in the office of the Secretary of State, so that future legislatures may know what unliquidated claims do exist against the

State, and the grounds upon which they are founded. "Sec 2. The unliquidated claims arising from the canal, shall all be proved up by witnesses, before the State trustee on said canal, which shall embrace all the testimony relating to said unliquidated claims, and no further testimony shall be allowed to be brought in to substantiate said unliquidated claims, after they are once filed as above." By the 3^d section, all unliquidated claims growing out of the internal improvement system and other causes, are required to be proved before the Auditor of public accounts, and filed with the Secretary of State. By the 4th section, all unliquidated claims against the State, that are not so proved and filed, before the 1st of January, 1849, are barred. The 5th section provides, that "the person hereby empowered to hear testimony, shall certify all proceedings had before him, under his hand."

In May, 1837, Henry L. Brush became seized in fee simple of one undivided half of the E. 1/2 of the S.E. 1/4 of section 2, in township 33, north, of range 3 east, in La Salle County, containing eighty acres. The Fox River feeder, which was constructed in 1838, passes across this tract of land.

In December, 1846, Brush presented his claim for damages to the State trustee, when the following proceedings were had.

"Application of Henry L. Brush for damages done by the Fox River feeder of the Illinois and Michigan Canal, to the undivided half of the east half of the south east quarter of section two (2) town 33, north, range three (3) east 3rd P.M. The said Brush exhibited to me satisfactory evidence of his title to said tract, being the certificate of the Register of the land office, of the entry of said tract by John Bascom, and the deed of said Bascom to him.

Henry L. Brush sworn, says, that the Fox River feeder of the Illinois and Michigan canal runs diagonally across the said tract of land; that about thirty acres of the eighty lies on the north side of the feeder, and the balance, about fifty acres, lies on the south side; that the land where the feeder crosses ~~said~~ tract ~~of~~ is underlain with a strata of coal, from eighteen inches to two

set in thickness; that witness has been informed, and has no doubt
of the truth of the information, that the coal found in the prism
of the feeder was taken out, by or under the direction of the
agents of the State, and sold for the benefit of the canal fund;
that the coal upon an acre of said tract, will not vary or
fall short of one hundred thousand bushels; that the coal
in the ground is worth, at least, the sum of a cent and a half
per bushel; that much of the coal has been sold by this official,
for two cents per bushel in the ground; that the coal as sold
lay on the north side of the feeder, and the mining of it was
and is rendered more difficult, in consequence of the construction
of the feeder, by reason of the water being dammed up on the
land, and continually leaking through the ground from the feeder;
that about two and one half acres of ~~ground~~ the coal has been
either actually used by the feeder and its banks, or rendered
useless or valueless, by reason of earth taken from the prism of
the feeder having been piled up on both sides of said feeder;
that the said undivided half of said eighty is also injured
by the construction of said feeder, by reason of its separating
said tract into two parts, rendering the north part of comparatively
little value, and by reason also of the large quantity of surplus
earth placed along its banks; that the feeder, not being navigable,
is of no benefit whatever to the land; that the feeder aside from
the coal is of, at least, one thousand dollars damage to the
said forty acres - making an aggregate damage to said tract
of land of, at least, four thousand seven hundred and fifty dollars.

Subscribed and sworn before me,
this 20th day of December A D 1848,
Chas Oakley. State Trustee

Henry L Prush."

John V A Hoos sworn, says, that
the statements and facts set forth in the above affidavit of
Henry L Prush, are true to the best of his knowledge,
information and belief.

John V A Hoos"

Subscribed and sworn to before me this 20th
day of December A D 1848.
Chas Oakley State Trustee

State of Illinois
 LaSalle County Sec

I Charles Oakley, State trustee of the Illinois and Michigan Canal, do hereby certify that on the 20th day of December, 1848, the above named Henry L Prush, claimant, appeared before me and adduced his title papers, and satisfactory evidence that he was and is the owner of the said tract of land, and also satisfactory proof that the said land had been injured, by the construction of said feeder, in the sum of four thousand and seven hundred and fifty dollars. Chas Oakley. State trustee

These proceedings were filed in the office of the Secretary of State, before the 1st of January, 1849.

During the June term, 1850, Prush presented a petition to this Court, setting forth the foregoing facts, and alleging that his claim for damages was settled and adjusted by the former State trustee, under and by virtue of the 10th section of the act of February 31st 1848, that said trustee promised to issue a certificate of indebtedness for the amount of the claim, but died without doing it; that the present State trustee refuses to recognize the settlement, and petitioner therefore prays that he may be compelled by mandamus, to issue a certificate of indebtedness. He also makes the following affidavit a part of his petition.

"John V A. Hoos sworn, says, that he was present at the taking of the proof and settlement of the claim of the relator, by the said Charles Oakley, on the 20th day of December 1848, referred to in the petition herein; that George H. Norris, surveyor of LaSalle County, Joseph H. Waggoner deputy surveyor, William Reddick, and this affiant were produced as witnesses by the relator, in support of his said claim; that the said affidavit of the said relator filed herein, does not embody all of the testimony adduced by the relator, in support of his said claim; that the material facts set forth in the said affidavit of the said relator, in support of his said claim, were proven by one or all of the said witnesses above named; that the affidavit of the relator was not intended to embrace the proof submitted, but only a

statement of the claim, and the grounds upon which it was based, to be filed in the office of the Secretary of State, to avoid the running of the statute of limitations of March 1st 1847, against him; that the relator regarded his claim as settled and liquidated by said Oakley, by his said certificate, and by his said verbal promise to pay the amount on his return from Springfield, made in the hearing of this affair, at the time of signing said certificate." John B. A. Does"

Subscribed & sworn to before me }
Philo Lindley. Clk, LaSalle Co. Court }

An alternative mandamus was issued and served on the state trustee, who appeared and entered a motion to quash the same.

Without undertaking at this time to determine the question, whether the act of the 1st of March, 1847, did, by necessary implication, take away the authority of the state trustee, to settle claims for damages growing out of the construction of the canal, and issue certificates of indebtedness in payment thereof - and we should, as at present advised, be strongly inclined to hold the affirmative, if the result of this case was to depend on the decision of that question - We are well satisfied, upon the case made by the relator, that there has been no adjustment of his claim, that is binding on the state, or the present state trustee. It seems very clear to us, that the former state trustee, in entertaining the application of the relator, and in hearing the proof adduced by him, was acting solely under the provisions of the act of March 1st 1847; and not by virtue of any authority conferred by the 10th section of the act of February 21st 1843, to settle claims of this character, and issue certificates of indebtedness in liquidation thereof. We entertain no doubt, but that he heard the proof under the 2nd section of the act of March 1st 1847, and certified the same under the 5th section, for the information and action of the legislature.

There is nothing on the face of the proceedings, or in the acts of the parties, to indicate that the certificate in question was regarded as a final settlement of the claim, which was to conclude

the state, or the trustee. If the trustee intended to adjust the claim, why was not the certificate of indebtedness then issued, and a receipt taken from the relator for the amount? If a settlement was designed, and any thing interfered to prevent its consummation at the time, it may fairly be inferred, that the intention would have been manifested by some unequivocal declaration to that effect in the certificate delivered to the relator. If the relator understood it to be a final adjustment of his claim, for the satisfaction of which he was entitled to receive from the trustee a certificate of indebtedness, why did he forward the proceedings to the secretary of state? In such case, the filing of the papers with that officer was wholly unnecessary, and not required by any existing law. Indeed, his office was not the proper depository for them. They properly belonged to the office of the state trustee, and should have been placed on the files of that office. The limitation contained in the act of March 1st 1847, did not apply to claims of this character, unless that act, by necessary implication, repeated so much of the 10th section of the act of February 21st 1843, as conferred power on the state trustee to make settlements. The certificate annexed to the proof is but a statement of the trustee, that the relator exhibited satisfactory evidence that he was the owner of the land, and as such had sustained damages to a certain amount by the construction of the feeder. It contains no intimation that he had settled the claim, and agreed to issue a certificate of indebtedness in discharge thereof. The fact that he admitted the proof to be satisfactory, does not, of itself, show that he was adjusting the claim. It can only be considered as an expression of opinion by the trustee, that the relator was entitled to receive from the state a certain amount in the way of damages; and not as an undertaking on his part to pay the same. There is, in addition, very strong evidence on the face of the proceedings, that the trustee did not consider himself as concluding the state by his action in the matter. While the relator in his application only claimed to be

the owner of an undivided half of the land, the estimate of damages covers the entire injury to the whole tract.

We cannot avoid the conclusion, that the claim would have been more closely scrutinized, and the certificate more guarded and pointed in its terms, if the trustee had regarded his action as obligatory on the State. And yet, it is seriously insisted by the relator, that he is entitled, by force of this certificate, to recover from the canal fund, on account of damages sustained by him as the owner of a moiety of the land, the sum of \$4,750,00, when, in point of fact, and upon his own showing, under oath, before the former trustee, that amount embraced the aggregate of damages to the whole tract. The evidence fails altogether to convince us, that there was any adjustment of the relator's claim, that can be enforced against the present trustee. On the other hand, we cannot look upon the action of the former trustee in any other light, than as a hearing of the proof produced by the relator in support of his claim, and a certifying of the same for the consideration of the legislature.

But, if a settlement was ever designed, the case fails to show that it was so far perfected, as to be binding on the State, or the trustee. The statute prescribed a particular mode, in which a settlement was to be made. It was to be done, "by issuing certificates of indebtedness" to the claimant. The issuing of a certificate of indebtedness was a necessary part of a valid settlement. Without it, a settlement would be essentially incomplete and imperfect. No rights could vest in the claimant, until the settlement was consummated by the delivery of the certificate of indebtedness. Up to that time, the negotiation would be open and uninclosed, and it would be in the power of the trustee to break it off entirely, and refuse to proceed further in the matter.

In the opinion of the Court, the present State trustee was acting strictly in the line of his official duty, in declining to regard the action of his predecessor as a settlement of the claim, and issue a certificate of indebtedness to the relator.

The latter must seek relief at the hands of the legislature.

The motion of the defendant will be sustained, and the proceeding dismissed, with costs against the relator.

The People ex rel.
H. L. Mush

v

J. B. Wells &c

Opinion

Heat, C. J.

Filed Dec. 20. 1850.
Id.

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People for Bush
7

Wells State, Trustee

1850

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