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the company cannot, by any conceivable diversion, be injured in any riparian properties and rights it may have; for it has not even commenced the construction of its projected power system, nor otherwise utilized the small parcel which it acquired shortly before this suit was instituted. Even if the company had riparian rights and should hereafter proceed with its development it might prove that defendant's diversion was of such a character that it would not substantially affect the company's use, *McElroy v. Goble*, 6 Ohio St. 187; or the circumstances might conceivably be such that the city would be held not to have exceeded its legal rights as riparian owner. *City of Canton v. Shock*, 66 Ohio St. 19; *Moody & Thomas Milling Co. v. City of Akron*, 93 Ohio St. 484; *Cleveland-Akron Bag Co. v. City of Akron*, 93 Ohio St. 486.

The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud and insolvency as the plaintiff has made.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration or decision of this case.

NELSON *v.* SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 129. Argued January 8, 1918.—Decided March 4, 1918.

A civil engineer, employed by a railroad company, while surveying within one of its yards, was injured by a fall resulting from a defective tie and a space between ties unfilled by ballast. In an action

under the Federal Employers' Liability Act, *held*, upon the evidence, that the company did not fail in any duty which it owed to him. 170 N. Car. 170, affirmed.

THE case is stated in the opinion.

Mr. A. L. Brooks, with whom *Mr. O. L. Sapp*, *Mr. S. Clay Williams*, *Mr. R. C. Kelly* and *Mr. C. L. Shuping* were on the brief, for plaintiff in error.

Mr. Garland S. Ferguson, Jr., with whom *Mr. H. O'B. Cooper*, *Mr. L. E. Jeffries*, *Mr. Clement Manly* and *Mr. John N. Wilson* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Nelson, a civil engineer who had been in the employ of the Southern Railway eleven years, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a cross-tie, a small V-shaped piece of it one and a half inches by six, being rotten, splintered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the Railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

Upon these facts Nelson sought in a state court of North Carolina to recover damages from the Railway

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under the Federal Employers' Liability Act. The trial court refused defendant's motion for a non-suit; and the jury rendered a verdict for plaintiff. Judgment thereon was reversed by the Supreme Court of the State (170 N. Car. 170) on the ground that there was no evidence of negligence; and the case came here on writ of error.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

Judgment affirmed.

BILBY ET AL. *v.* STEWART ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 160. Submitted January 25, 1918.—Decided March 4, 1918.

The court may not review a judgment of a state supreme court resting on a non-federal ground adequate to support it.

Where the probate of the will of a full-blood Creek Indian was refused solely on the non-federal ground of mental incapacity, questions sought to be raised under acts of Congress, concerning the execution of the will, its legal effect, and the necessity for probate, *held* immaterial.

An attempt to raise federal questions through an application to file a second petition for rehearing in the state court comes too late.

Writ of error to review 153 Pac. Rep. 1173, dismissed.

THE case is stated in the opinion.

Mr. Lewis C. Lawson for plaintiffs in error.

Mr. George C. Crump, Mr. Jasper L. Skinner and *Mr. J. Ross Bailey* for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma, which affirmed on appeal the judgment of the Dis-