As these principles require a reversal of the case, it is not deemed necessary to notice the other exceptions, which are unimportant, and may not arise on a new trial.

JUDGMENT REVERSED.

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## RAILROAD COMPANY *v.* LINDSAY.

1. The article 3499 of the Civil Code of Louisiana, which prescribes that "actions for the payment of freight of ships and other vessels are prescribed by one year," does not apply to a case where the plaintiffs were shipbrokers only and not shipowners, and where the contract was not one of affreightment.
2. A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to the time or place of delivery, yet with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties.
3. Where none of the evidence offered by a plaintiff is objected to below, and no exception taken to the findings of the court there, objection cannot be made in this court.
4. An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained.
5. Such case comes within the thirty-second section of the Judiciary Act, curing imperfections, defects, or want of form in the pleadings or course of proceedings, except such are specially demurred to.

LINDSAY & Co., *ship-brokers*, of London, filed their petition in the Circuit Court for the Eastern District of Louisiana, in which—alleging a written contract between themselves and the New Orleans, &c., Railroad Company, the company bound itself to pay them "freights," at the rate of 25*s.* per ton, "in consideration of freightage to be furnished to Algiers, opposite New Orleans, for certain iron rails," &c.—they averred that, in pursuance of the aforesaid contract, they did furnish freightage for several thousand tons of such rails, from Wales to Louisiana, and that the balance of the freight upon the rails due them was $18,000, &c.

Statement of the case.

The defendants denied that the contract had been performed; claimed damages by way of "re-convention," and "pleaded the prescription of one year and three years;" that is to say, set up, in argument, the bar of limitation of one year, under article 3499 of the Civil Code, which prescribes, that actions "for the payment of the freight of ships and other vessels are prescribed by one year;" and the limitation of three years, to which an act of the Louisiana legislature limits actions upon open accounts.

The court found, on a submission of the case to them, in accordance with the Louisiana practice, that a large portion of the rails had not been delivered within the time stipulated for; and that of these a portion had been sent, not to Algiers but to New Orleans, for the cost of removing which to New Orleans the plaintiffs were entitled to re-coup; that the time within which the freightage was to be furnished had been extended and limited by a subsequent agreement to a date fixed; that the railroad company refused to receive any rails delivered after that date; that the manufacturers resumed possession of these; that the company had not proved any special damage as resulting from the delay mentioned, and that this delay had been owing to the acts of Lindsay & Co., who had found, during the Crimean war, a more profitable employment for the ships.

The court declared that the contract was not a contract for the payment of the freight of ships and other vessels, within article 3499 of the Civil Code set up; and overruling also the prescription of three years given by statute for open accounts, gave judgment in favor of the plaintiff below "for the whole amount of freightage, at the rates specified in the contract," allowing certain credits and the cost of transferring to Algiers those rails which had been improperly landed at New Orleans.

The case came here on error, two errors being assigned.

1. That the court allowed the plaintiffs, Lindsay & Co., to recover on an express agreement, when it was found that they had never performed it.

2. That they had overruled the plea of prescription.

Argument for the railroad company.

*Messrs. Carlisle and McPherson, for the plaintiff in error:*

I. As to the special contract. It is a settled principle of law that a party cannot recover upon a contract without proving performance of all conditions precedent, and their performance within the limited time, when a time is limited.*

It is true, the court found that the defendants had not proved "any special damage" by the delay; but under this issue they were not bound to prove any damage, special or other. To require it was to shift the burden of proof, and relieve the plaintiffs from the exigencies of their own case.

We agree that in the civil, as well as at common law, a recovery may be had, although there be a failure to prove performance of the special contract, if the defendant have derived any benefit in the premises. But such recovery can only be *ex equo ex bono*, and undeniably must be founded on some proof tending to show some service performed and accepted, other than that stipulated in the contract, and what the plaintiff reasonably deserved to have from the defendant therefor. The objection here is, that all such proof is absolutely wanting. The court does not find that the defendant below derived any benefit from the services of the plaintiff, or what was the value of the service rendered, or that it was of any value.

II. As to the statute of limitations, or prescription of one year. The court proceeded, doubtless, on the ground that the special contract was in the nature of a brokerage contract, the plaintiffs below being middle-men between the defendant and the shipowners. But we have seen that the plaintiffs wholly failed to make any case upon the special contract; and if they could recover at all, must do so upon the implied contract arising out of the service performed by them, to wit: the transportation of the goods. In other words, it was an implied contract for the freight of ships merely, which arose directly between the parties to the suit, to the exclusion of all third persons, and, consequently, was within

* Slater *v.* Emerson, 19 Howard, 229.

the letter as well as the spirit of the article of the Civil Code above cited.

*Mr. Janin, contra:*

I. *As to the basis of the recovery.*

The objection is really an allegation of variance. But it is far too technical to prevail. No objection of this sort was made below. It must be considered as waived.

II. *The plea of the prescription.*

As to the one year, this case is different from that of a ship-owner or captain contracting for the freight of goods shipped by his vessel. The plaintiffs are ship-brokers; they bound themselves to provide vessels to transport a large quantity of iron from Wales to New Orleans, an obligation which the iron-masters probably were not able or willing to assume. It might not have been possible for the iron-masters or the agents of the defendants to find a sufficient number of vessels for this purpose. It may only have been possible for large ship-brokers to influence such a number of vessels to undertake this business. So, no doubt, the defendants thought when they made the contract of 1853. It was, in short, a legitimate commercial undertaking on the part of plaintiffs, who thought that, owing to their position, they could undertake such a duty with advantage, and were willing to run the risk of it.

This is different from the case of a captain of a vessel who agrees to take freight for one trip at a fixed price. A contract for a fixed freight, such as is contemplated by article 3499 of the Civil Code of Louisiana, is evidenced by a bill of lading, and not by an agreement extending over years and involving the employment of many vessels, like that upon which this suit was brought. It is therefore clear that that article is not applicable to the present case.

And it is equally clear that the act of the legislature of Louisiana, which limits actions upon open accounts to three years, is not applicable to this case.* The account was not

* Acts of Louisiana of 1852, p. 90, Revised Statutes, 82

an open account, but an *admitted* account, which it was attempted to extinguish by a counter-claim.

In the case of the *New Orleans Railroad Company* v. *Estlin*,* the defendant was sued for the unpaid balance of his subscription to the stock, and pleaded the prescription of three years, contending that he was sued upon an open account. The court said: "The defendant was not sued upon an open account. The demand is based upon an express and written contract." In *Cooper* v. *Harrison*,† an agent was sued for the price of land sold by him for his principal during a number of years. The prescription of three years of actions upon open accounts having been pleaded under the statute of 1852, the court said: "We are of opinion that the accounts due by an agent for the selling of lands cannot be considered as embraced in the sense of the statute in the words 'open accounts.' And as they are not enumerated in the articles in the Civil Code on the prescription of one, three, and five years, they are consequently subject to that of ten years."

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiffs in error were the defendants in the court below. The plaintiffs in that court filed their petition, setting forth a contract between them and the defendants, whereby the plaintiffs agreed to transport from Wales, and deliver at Algiers, opposite to New Orleans, certain railroad iron for the defendants, and the defendants agreed to pay them a stipulated compensation for such transportation and delivery. The petition averred performance, and sought to recover the specified compensation, less the amount which the plaintiffs had already received. The defendants, by their answer, denied performance, claimed damages by reconvention for non-performance, and pleaded the statute of limitations.

The parties waived the intervention of a jury, and submitted the case to the court. The court found the facts

* 12 Annual Reports, 184.

† Id 631.

specially, and gave judgment for the plaintiffs below. The findings of the court are set forth in the record, and are to be regarded as a special verdict. The court found, among other things, that the iron had not been delivered within the contract time, but that it had been agreed between the parties, in September, 1854, that the plaintiffs should allow the defendants eight hundred pounds, on account of past delays, and that the time for the further deliveries should be extended to the first of December following; that the defendants refused to receive the iron tendered or shipped after the last-mentioned time, and that it was thereupon disposed of, with the assent of all concerned; that the defendants had not shown any damage arising from the delays; that the delivery of the iron at New Orleans was a breach of the contract, and that the defendants were entitled to recoup the cost of removing it to Algiers. Upon these principles, the amount to be recovered was computed, and judgment was rendered accordingly. The court was of opinion that the contract was "not a contract for the payment of the freight of ships and other vessels within the 3449th article of the Civil Code," of the State, and overruled the defence that the action was thereby barred. No bill of exceptions was taken, and but a small part of the evidence appears in the record.

Two errors are relied upon; one of them relates to the statute of limitations. We think the ruling of the court upon this subject was correct. The findings show that the plaintiffs were not ship-owners, and that their contract was wholly different from one of affreightment. The article of the Code relied upon had, therefore, no application to the case. Nor can the demand be regarded as an open account. The contract was the foundation of the claim, and though not fulfilled according to its letter, either as to the time or place of delivery, yet, with the qualifications which the law under such circumstances imposes, it determined the respective liabilities of the parties. The plaintiffs could not recover more than the contract price, and the recoupment

of the defendants was governed by its requirements on the part of the plaintiffs. Its provisions were elements in the case, vital to the rights of both parties. By their light, and the law arising upon the facts as developed in the evidence, the court was to be guided in coming to its conclusions.

The other error insisted upon is, that there is a fatal variance between the facts as found by the court, and by the case made by the plaintiffs' petition.

It does not appear that any of the evidence offered by the plaintiffs in the court below was objected to by the defendants, nor does it appear that any exception was taken when the court announced its findings, or subsequently, when the judgment was entered.

It was in the power of the court to permit the petition to be amended, and the proper amendments would doubtless have been made if the objection had been stated. It is presented for the first time in this court. Under these circumstances, it must be held to have been waived by the plaintiffs in error in the court below, and they are concluded by that waiver in this court.

There is another ground upon which this exception must be overruled. It is not alleged that the findings of the court were unwarranted by the proofs, nor that the judgment does not conform to the law and justice of the case, as the case is thus presented. The objection is purely technical. It lies wholly in the variance between the averments of the petition and the facts as found by the court.

The thirty-second section of the Judiciary Act of 1789, declares that the courts of the United States, "respectively, shall proceed and give judgment according as the right of the cause and the matter in law shall appear unto them, without regarding imperfections, defects, or want of form in such writ, declaration, or other pleading, return process, or judgment, or course of proceeding whatsoever, except those only in case of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof."

Syllabus.

The effect of this provision is decisive. No case more proper than the one before us, for its application, can be presented.

The judgment below is

AFFIRMED, WITH COSTS.

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## ROBBINS *v.* CHICAGO CITY.

1. Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced.
2. The term "parties," as thus used, includes all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.
3. Express notice to defend is not necessary in order to render a party liable over for the amount of a judgment paid to an injured plaintiff. If the party knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of the damages. *Chicago City* v. *Robbins* (2 Black, 418), affirmed.
4. Absence of objection by municipal officers to a person's building an area in a public sidewalk, may infer a permission to build the area but cannot infer a permission to leave it in a state dangerous to persons passing by.
5. A person building a storehouse on a street, who, in consequence of the city's raising the carriage-way of the street, raises a sidewalk so as to make it conform to the grade of the carriage-way—such person obtaining by his mode of raising the sidewalk, vaults and an area for the benefit of his building—does not do a public work, nor relieve himself from the penalty of making a nuisance if a nuisance is made by what he does.
6. In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "*dug*, opened, and *made*," the area is sustained by proof that he formed it partially by excavation and partially by raising walls.
7. Where work done on a public highway necessarily constitutes an obstruction or defect in the highway which renders it dangerous as a way for travel and transportation unless properly guarded or shut out from public use, in such case a principal for whom the work was done cannot defeat the just claim of a municipal corporation which has had to pay