evidence shows they were, when paid, equally with Confederate paper valueless in Pennsylvania.

The views taken of this case accord with *Ward* v. *Smith*,* and are supported by the Court of Appeals of Virginia in *Alley et al.* v. *Rogers*.† It follows, from what has been said, that the bond given by Charles Stover to Isaac Fretz and Catharine his wife has not been paid, or any part of it, and that the deed of trust to secure it is still a subsisting security in full force and effect.

DECREE REVERSED AND THE CAUSE REMANDED, with instructions to enter a decree for Catharine Fretz, survivor of her husband, in conformity with this opinion.

REVERSAL AND REMAND ACCORDINGLY.

SWEENEY ET AL. v. LOMME.

1. In a suit on a replevin bond given to the sheriff, where the question whether the proper party to sue is the sheriff or the party for whose benefit the bond was given, depends upon the code of practice of Montana Territory, this court will not reverse the decision of the Supreme Court of that Territory on the question; that being a question on the construction of their own code.
2. In a suit on a replevin bond the defendants cannot avail themselves of the failure of the court to render in the replevin suit the alternative judgment for the return of the property or for its value; even if that were an error for which that judgment might be reversed.
3. If a return be awarded in the replevin suit, the surety is liable on the condition of the bond to return, and this without execution or other demand for its return. The judgment establishes the liability.
4. Nor is this liability to be measured in this action by the value of the interest in the property of the attachment debtor, for whose debt it was seized by the sheriff. The value of the property at the time it was replevied, limited by the debt still due on the attaching creditor's judgment and the penalty of the replevin bond, are the elements of ascertaining the damages in the suit on that bond.
5. When it appears for the first time in the argument of a cause that the

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* 7 Wallace, 451. † 19 Grattan, 381.

existence of the judgment appealed from is not stated in the record, the court of its own motion may allow the plaintiff in error a certiorari and time to produce a certified copy of it.

ERROR to the Supreme Court of the Territory of Montana.

The case was thus:

The Civil Practice Act of the Territory of Montana thus enacts:

"Every action shall be prosecuted in the name of the real party in interest."

"In an action to recover possession of personal property judgment for the plaintiff may be for the possession; OR the value thereof in case a delivery cannot be had, and damages for the detention of it."

This enactment being in force, Lomme sued B. & C. Kintzing, in one of the District Courts of the said Territory, as partners, to recover a debt, and in that suit issued an attachment, under which the sheriff seized certain personal property, alleged to belong to the Kintzings, as security for the satisfaction of any judgment that might be recovered against them.

In this state of things one Watson brought replevin against the sheriff, to recover possession of this property; and—two persons, Sweeney and Holter, entering as sureties into a written undertaking to the sheriff, in $5000, conditioned "for the return of the property to *him*, if return thereof should be adjudged, AND for the payment to him of such sum as might be recovered against Watson"—the property was delivered to Watson.

In this action of Watson against the sheriff the jury found a verdict "for the defendant," on which the court entered a judgment to the effect that the sheriff "recover from the plaintiff, Watson, the possession of the property replevied in this action," and his costs.

The jury did not find the *value* of the property replevied, nor was any alternative judgment entered against Watson, as required by the already quoted section of the Civil Prac-

tice Act, for the *value* of the property in case a return could not be had.

No execution was ever issued on this judgment for the return of the property; nor was it ever returned or offered to be returned to the sheriff, by either Watson or his sureties.

Going back now to the original suit. In that suit Lomme obtained, October 27th, 1870, judgment against the Kintzings for $4954, with interest at 10 per cent. and costs, about $1300 of which was got on execution.

Thereupon he sued Sweeney and Holter, as sureties in the undertaking given to the sheriff in the replevin suit brought against him by Watson for the property attached by the sheriff at the instance of Lomme, as the property of the Kintzings; the object of this suit being to recover from the sureties the value of the property replevied, or so much thereof as might be necessary to satisfy the balance of the amount due upon the judgment obtained by Lomme against the Kintzings.

On the trial the plaintiff, Lomme, gave no evidence of the assignment, or of the *delivery*, of the replevin bond to him by the defendant in the action of *Watson* v. *The Sheriff;* and was permitted to prove the value of the property attached, at the time it was replevied by Watson, this value being fixed by witnesses at from $7000 to $10,000.

At the conclusion of the plaintiff's case, the defendant moved for a non-suit, on the ground that Lomme could not sue in his own name on the bond given to the sheriff. The court refused the non-suit, holding that the bond having been for the use of Lomme, and he being the real party in interest, he could so sue.

The evidence being all in, the defendants requested the court to charge:

That the only interest which the plaintiff could claim in the goods was just the interest which the Kintzings had at the time of the levy of the attachment on them, and that he could recover no greater amount from the defendants than the value of the interest of the Kintzings in them, at the said time, if he recovered at all.

Statement of the case.

That unless a writ *de retorno habendo* (that is to say, for the return of the property claimed in the complaint) had been issued to the proper officer previous to the commencement of this action, then that the verdict should be for the defendants.

That the undertaking sued on fixed the value of the property replevied at $2500 at the time the same was replevied, and the jury could not fix the value thereof to be any greater sum.

The court refused to give any one of these charges, though it did charge that the $1300 which Lomme had recovered on his suit from the Kintzings was to be deducted from what the jury might find.

The court charged that the plaintiff's damages should be assessed at such amount as the jury might find remained unsatisfied upon his judgment against the Kintzings, with interest, and his costs expended in Watson's suit against the sheriff, if they found that the value of the property replevied by and delivered to Watson at the time it was so delivered, and not returned to the sheriff or placed in subjection to the plaintiff's judgment against the Kintzings, was equal to the balance of the judgment and the amount of the costs; and if the property was not equal to the said balance and costs, that the jury should assess the plaintiff's damages at the amount they should find the said property was worth at the time of its delivery to Watson, and the amount of plaintiff's costs in *Watson's* suit against the sheriff, with interest on such amounts at ten per cent. per annum.

That the only question for the jury to determine was, whether possession of the property delivered to Watson was ever returned to Roberts, and to determine the value of the property so delivered to Watson and not so returned.

The jury found, November 10th, 1871, in favor of the plaintiff for $5000. The record as it came up to the court omitted to show, by the usual sort of entry, that judgment had been entered accordingly. However, there was in the record a notice by the defendant's counsel to the counsel of the plaintiffs, "that the defendants appealed to the Supreme

Court of the Territory from the judgment made and entered in the District Court of the Territory, in favor of the plaintiff and against the defendants." And also an order by the Supreme Court of the Territory that the cause of *Lomme* v. *Sweeney et al.*, "coming on for judgment on the appeal herein," it was ordered "that the judgment entered herein by order of the court below be affirmed with costs."

This the counsel of the plaintiffs in error had regarded as a sufficient evidence of the entry of a judgment for $5000 in the District Court, and an affirmance of it in the Supreme Court, and so brought the case here. The errors assigned were:

1. That Lomme was allowed to sue in his own name.
2. That the verdict in the replevin suit was in violation of the provision in the Civil Practice Act, since it did not find the value of the property, and there was no alternative judgment for that value, OR the return of the property.
3. That proper instruction had been refused.
4. That wrong ones had been given.

Mr. J. Hubley Ashton, for the plaintiffs in error, and Mr. Robert Leech, contra; the latter gentleman in his brief calling attention to the peculiar form of the evidence of the judgments in the District Court, which he suggested was no evidence of *what* judgment, if any, had been given; and Mr. Ashton informing the court that the peculiarity was due to a mere clerical error, that would be remedied by certiorari, if the court saw fit now to order one, and would suspend its judgment till one could issue and be returned. The court directed the argument to proceed, and a certiorari to issue.

[A certiorari having thus issued and been returned, showed the error to have been a mere clerical one, as alleged by Mr. Ashton.]

Mr. Justice MILLER delivered the opinion of the court.

1. The first error assigned and mainly relied on is that the bond on which the suit is brought having been given to the

sheriff, this action cannot be maintained by Lomme, the party for whose benefit it was really given.

This question has been decided differently by different State courts under precisely the same code of practice.

In several of these it has been held that the real party in interest is always the proper plaintiff, while in others it is held that the suit must be brought by the obligor in the bond for the use of the party in interest.

Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it. This assignment of error is, therefore, not well taken.

2. The next objection is that the verdict in the replevin suit did not find the value of the property, and that there was no alternative judgment for that value or the return of the property.

On this question also conflicting authorities are produced as to what judgment should have been rendered under codes precisely similar to the Montana code in regard to actions of replevin. And in the case of *Boley* v. *Griswold*,* in a direct appeal, we have held that a judgment in replevin may be good though the alternatives are not expressed. But we are not now considering whether that judgment was erroneous or not. No writ of error to that judgment is pending in this court. As the jury found for the defendant, the sheriff, and the court rendered judgment for a return of the property to him in a suit in which it had jurisdiction to render that judgment, it is not void because it did not add something else which it might have added.

The undertaking of the plaintiffs in error was "for the prosecution of said action (of replevin), for the return of said property, if return thereof be adjudged, *and* for the payment to the said defendant of such sum as may from any cause be recovered against said plaintiffs." The judgment, there-

* 20 Wallace, 486.

fore, which is valid until reversed, established one of the conditions on which the plaintiffs in error agreed to be liable, and as the property was not returned, either by them or by Watson, they are liable to an action on their contract.

3. Nor do we think the court erred in refusing to instruct the jury that Lomme could only recover the value of the interest of the Kintzings in the property. This would have been to try the action of replevin over again. If Watson had no right to the property he had no business to interfere, and if he thought some person not yet before the court had a paramount interest in it he should have returned the property and left such person to assert his own rights. Having replevied the property and failed to establish his own right to it in the suit thus provoked by him, he is but a trespasser in holding possession afterwards.

4. Nor do we think that it was necessary that an execution should have been issued to retake the property under the judgment in the action of replevin before the liability of the plaintiffs in error in the replevin bond accrued. They undertook, themselves, in express terms, that they would be liable if a judgment for return of the property was had, and not on condition that it could not be had on execution. This question was before us in the recent case of *Douglas* v. *Douglas*,* in which it was held that the judgment of *de retorno habendo* rendered the party liable on a replevin bond.

5. The bill of exceptions shows that the goods, at the time they were replevied, were worth from $7000 to $10,000. The verdict of the jury was for $5000, the penalty of the bond. As there is nothing in the record to show that there was not due to Lomme on his judgment against the Kintzings, including interest and costs, and for the costs and expenses of defending the replevin suit, the sum of $5000, all these elements of damages being before the jury, we cannot say that the verdict was for too much or that the judgment rendered on it was erroneous.

6. A point was made in the defendant's brief that there

* 21 Wallace, 98.

was no judgment found in the record, and an inspection of it showed that while the judgment of the Supreme Court of the Territory merely in terms affirmed the judgment of the District Court, the judgment of the District Court was not in the record, and, in fact, no judgment was to be found in the record which we could either reverse or affirm.

Under these circumstances, as the defendants in error had made no objection, by motion to dismiss the writ, or otherwise, before the hearing, the court heard the argument, and of its own motion gave the plaintiffs time to perfect the record by certiorari, if it could be done. The proper judgment has since been certified to this court, and it is now

AFFIRMED.

BAILEY *v.* MAGWIRE, COLLECTOR.

1. A claim of exemption from county and municipal taxation cannot be supported, any more than a claim from State taxation, except upon language so strong as that, fairly interpreted, no room is left for controversy. No presumption can be made in favor of the exemption; and if there be reasonable doubt, the doubt is to be solved in favor of the State.
2. The fact that in an act amending the charter of a railroad corporation special provision is made for ascertaining the taxes to become due by the corporation to the State (nothing being said about the manner of ascertaining other taxes), is not of itself enough to work an exemption of the property of the corporation from all taxation not levied for State purposes. Silence, in regard to such other taxes, cannot be construed as a waiver of the right of the State to levy them. There must be something said affirmatively, and which is explicit enough to show clearly that the legislature intended to relieve the corporation from this part of the burdens borne by other real and personal property, before such an act shall amount to a contract not to levy them.
3. A provision in such an act, prescribing a mode for ascertaining the tax due the State, by which provision the president of the company is required to furnish to the auditor of the State a statement, under oath, of the actual cash value of the property to be taxed, on which the company is directed to pay the tax due the State, within a certain time, to the treasurer, under penalties, does not amount to a contract, that the State will not pass any law to assess the property of the company for taxation for State purposes in a different manner.