MILLER *v.* EASTERN OREGON GOLD MIN. CO.

(*Circuit Court, D. Oregon.* March 2, 1891.)

1. MOTION FOR NEW TRIAL.
Grounds of, discussed, and *held* not sufficient.

2. FOREIGN CORPORATIONS.
A foreign corporation may be an "inhabitant" of a district or country other than that of which it is a citizen or subject, or where it was organized, within the meaning and purpose of the term, as used in section 1 of the judiciary act of 1888.
(*Syllabus by the Court.*)

At Law. Motion for new trial.
John Gearin, for plaintiff.
Arthur C. Emmons and *Frank V. Drake*, for defendant.

DEADY, J. This action was commenced on May 7, 1889, to recover damages for the wrongful refusal of the defendant to transfer 6,000 shares of its stock on its books, whereby the plaintiff lost the sale thereof, and was damaged $24,000.

On the same day a summons was issued against the defendant, which was personally served at once on "——— Bates, president, and J. Gilbert Bowick, director," of the defendant. On May 17th a motion was made to set aside the service because the defendant "is a foreign corporation," and the alleged cause of action "arose without the jurisdiction of the court," and it does not appear that at the time said cause of action arose, or since, the defendant "either carried on business or had property within the jurisdiction of this court."

On May 20th the plaintiff filed his affidavit, in which it is stated that the defendant was organized in 1888 in London, England, and is owner of the Monumental mine and mill property, situate in Grant county, Or., and of no other property anywhere; that the defendant was organized to purchase and work said property, and was then engaged in so doing; that at the time of the service of the summons, as aforesaid, on Bates and Bowick, the former was president of the defendant, and the latter director thereof, and both were large stockholders therein, and were then in Oregon looking after the business of working and managing said mine.

On May 24th the motion to set aside the service of the summons was denied, and on the 25th of the same month the plaintiff filed an amended complaint, alleging therein, among other things, the facts aforesaid concerning the location and ownership of said mine, and also that the defendant is carrying on business in the state of Oregon, and "is an inhabitant" thereof.

On May 30th a demurrer was filed to the amended complaint, and on June 19th the same was withdrawn, and the defendant had leave to file a plea in abatement, which was done on July 8th. The plea contained no denial of any allegation of fact in the complaint, but alleged that the defendant was an "inhabitant" of London.

On July 12th a demurrer was filed to this plea, and on November 20th, after argument, the demurrer was sustained.

On December 4th an answer was filed, containing denials of sundry allegations in the complaint, and a defense, to the effect that the plaintiff's shares were originally issued to one Isaac Kaufman, from whom the defendant purchased the mine, on condition that they should not be transferred until the title to the mine was obtained from the United States, which was not yet done, and this fact the plaintiff well knew when he took the assignment of his stock from Kaufman, and therefore the defendant was justified in refusing to transfer the same on its books.

On January 3, 1890, the plaintiff replied to this defense, denying it *in toto*, and alleging that the only condition attending the sale was that the defendant should be put in possession of the mine, which was duly done.

Thereafter, on July 2d, the cause was tried with a jury, when there was a verdict for the plaintiff for $24,000, with interest thereon from February 29, 1889, on which judgment was given for the plaintiff, with costs.

A motion for a new trial has been argued and submitted.

On the argument two points were made in support of the motion: (1) That in setting the cause for trial the court did not give the defendant time to get Bowick and one William E. Parsons, the trustee of the defendant, from London and New York, respectively, whereby the defendant lost the benefit of their advice and direction on the trial; and also their testimony in support of the defendant's allegations as to the terms of the contract of purchase from Kaufman.

There has been plenty of time to obtain the affidavits of these persons as to what they know on this subject and would swear to. Nothing of the kind has been done, and therefore it does not appear that they are or were material witnesses for the defense. The counsel states what he "expects to prove" by them, but, in the unexplained absence of the better evidence,—the affidavits of Bowick and Parsons,—this amounts to nothing. Nor does it satisfactorily appear that these persons might not have been here at the trial if they desired to be. They are both, in interest and effect, parties to the action, and were in the state not long before the trial. An affidavit of Kaufman's is produced, stating that he would testify in support of the defense; that he expected to be present at the trial, and was subpœnaed late the evening before to appear and testify, but that, being taken suddenly ill, he went the next morning, to save his life, to the Hot Springs in Idaho. But Kaufman is so thoroughly contradicted by the counter-affidavits on this point that he seems unworthy of credit.

And it appearing that the contract for the purchase of the mine was in writing, and is in the possession of the defendant, who has neglected or refused to produce it, oral evidence as to its contents or provision concerning the assignment of Kaufman's stock, if any, is inadmissible. Furthermore, it appears that Kaufman not only actually indorsed the shares of stock in question, and delivered them to the plaintiff, but on

learning that, under the law of Great Britain, the transfer must be made by deed, he executed a power of attorney, authorizing the execution of said deed, and delivered it to the plaintiff. His conduct in this respect is wholly inconsistent with his proposed testimony.

Neither did the defendant at first make any such objection to the transfer of the shares on its books as that Kaufman had no right to assign them, but only that, by the limited company's act, the assignment must be made by the deed of the assignor; and when the deed was presented, then this objection of want of right in Kaufman to make the assignment was brought forward.

On the whole, I find no reason to grant a new trial on this ground.

(2) That the court had no jurisdiction to hear or determine the case, because the defendant is not, and never was, an "inhabitant" of this district.

Section 1 of the judiciary act of 1888, among other things, provides that the circuit courts of the United States shall have jurisdiction of all suits of a civil nature, where the matter in dispute exceeds the sum or value of $2,000, in which there shall be a controversy between citizens of a state and foreign states, citizens, or subjects.

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of the different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the judiciary acts of 1789 and 1875, following the term "inhabitant" in the above quotation, were the words: "Or in which he shall be found at the time of serving such process or commencing such proceeding."

By this means the circuit courts are given jurisdiction in the general or abstract of all suits in which, as in this case, there is a controversy between a citizen of a state of the United States and a subject of a foreign state. The clause in the act prescribing the place where a defendant may be sued does not affect this jurisdiction. It is so far a personal exemption in favor of the defendant, which he may waive, and consent to be sued in any district, without reference to his citizenship. *Ex parte Schollenberger*, 96 U. S. 377. And in *Railway Co.* v. *Harris*, 12 Wall. 65, the supreme court says that if a foreign corporation does business outside of the place of its organization, it thereby consents to be sued there,—is "found" there.

Between being thus found in a district and being an inhabitant thereof there is no substantial difference. The reason for dropping this clause in the act of 1888, I apprehend, was the liability to hardship or inconvenience, in the case of natural persons who might be thus sued far from home and the means of defense, while traveling through the country on business or pleasure, without the least element of inhabitancy in the case. But this can never be the case with a foreign corporation es-

tablished in business in a district other than a place of its organization.

It is not probable that congress intended to give a corporation, the subject of a foreign state, engaged in business, with a local habitation in the United States, the option of suing a citizen of the United States in a national court, and to deny such citizen having a controversy with or a demand against such foreign subject, engaged in business in the United States, the corresponding privilege.

And yet, if a corporation, the subject of a foreign state, cannot become an inhabitant of this district, because it cannot migrate here and become a citizen of the state, such result would follow.

"An inhabitant of a place is one who ordinarily is personally present there, not merely *in itinere*, but as a resident and dweller therein." *Holmes* v. *Railway Co.*, 6 Sawy. 277, 5 Fed. Rep. 523.

A natural person may be a citizen or subject of one country and an inhabitant of another. Why cannot a corporation formed under the laws of Great Britain become an inhabitant of Oregon?

Take this case, for instance.

The defendant, the Eastern Oregon Gold Mining Company, is a corporation formed in London for the express purpose of purchasing, owning, and working a mine in Oregon. It has no other property or business, and is here in the person of its officers and agents engaged in working the mine.

The supreme court has not passed upon this question, and until it does I shall follow the dictates of my own judgment, which is that the defendant is an "inhabitant" of this district within the meaning of the judiciary act.

This question has been thoroughly considered in *Zambrino* v. *Railway Co.*, 38 Fed. Rep. 449, by Mr. Justice MAXEY, in which he came to the conclusion that the defendant, a Texas railway corporation, whose principal office and place of business was in the eastern district of Texas, was an inhabitant of the western district of Texas, because its road extended there, where it had an agent and office for the transaction of its ordinary business.

This ruling was affirmed and followed in the similar case of *Riddle* v. *Railroad Co.*, in 39 Fed. Rep. 290, by Justices MCKENNAN and ACHESON.

Of course, to enable the court to exercise this jurisdiction over the defendant, the law of its procedure—the law of the state—must provide for the service of process within the district on some representative thereof.

The statutes of Oregon provide, in effect, that in an action against a private corporation the summons shall be served within the state "by delivering a copy thereof, together with a copy of the complaint, * * * to the president or other head of the corporation."

This has been done in this case, and the court thereby acquired jurisdiction of the person of the defendant, as well as the subject-matter of the suit—the controversy between the parties—which is conferred generally by the statute.

The motion is denied.

In re SCHOVERLING *et al.*

(*Circuit Court, S. D. New York.* January 29, 1891.)

1. CUSTOMS DUTIES—GUN-STOCKS—TARIFF ACT OF OCTOBER 1, 1890.
Gun-stocks, with mountings complete, ready for attachment to the barrels, which arrived by another shipment, and which, when attached, made double-barrelled breech-loading shotguns complete, *held* to be dutiable at 45 per centum *ad valorem*, as "manufactures, articles, or wares not specially enumerated or provided for, composed wholly or in part of iron, steel, * * * or any other metal, and whether partly or wholly manufactured," under paragraph 215 of the act of October 1, 1890, and not dutiable at the higher duty provided in paragraph 170 of said act, for "all double-barrelled, sporting, breech-loading shotguns."
2. SAME—INTENTION.
The intention with which goods are imported into this country is immaterial, provided importers keep within the terms of the tariff act, and duties are to be assessed upon merchandise in the form or condition in which it actually arrives, and under the provisions of law applicable thereto.

Appeal from Board United States General Appraisers.

The importers, Schoverling, Daly & Gales, of the city of New York, on the 20th of October, 1890, imported, per steamer Amsterdam, into the port of New York certain gun-stocks with the usual metal mountings complete, without the barrels. The collector of the port assessed duty thereon under paragraph 170 of the tariff act of October 1, 1890, which provides for both a specific and *ad valorem* duty upon "all double-barrelled, sporting, breech-loading shotguns." The collector held that they should pay such duty because the only use to which they could be put was in connection with the barrels of such arms, and it was admitted by the importers to be their intention to fit the stocks with barrels imported by another house, in which a member of their firm was a partner. The importers duly protested against this exaction of duty, claiming that their merchandise were not shotguns, but only parts thereof, and that they were properly dutiable under paragraph 215 of said tariff act of October 1, 1890, which reads as follows:

"Manufactures, articles, or wares not specially enumerated or provided for, composed wholly or in part of iron, steel, * * * or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*."

—And duly appealed to the board of United States general appraisers, sitting at the port of New York, which board affirmed the decision of the collector. The importers thereupon took the necessary proceedings under section 15 of the act of June 10, 1890, to bring the case before this court for a review of the decision of the board of general appraisers. The appraisers, in pursuance of an order of the court, duly filed their return, with the testimony taken before them, from which it appeared that the said firm of Schoverling, Daly & Gales had an agreement with another firm, of which Mr. A. Schoverling was also a partner, by which the latter were to order the barrels for these goods, with the mutual understanding that the stocks and barrels after arriving at the port of New York by different shipments were to be put together, so as to make completed double-barrelled, sporting, breech-loading shotguns; and that noth-

ing remained to be done after importation to the gun-stocks or to the barrels, except the ordinary manipulation of putting them together.

Comstock & Brown, for importers,—

Cited *Farwell* v. *Seeberger*, 40 Fed. Rep. 529; *Luckemeyer* v. *Magone*, 38 Fed. Rep. 35; *Merritt* v. *Welsh*, 104 U. S. 694, claiming that the importers had the right to import goods in any condition to meet the requirements of the tariff act, in order to have their goods dutiable at a lower instead of a higher rate of duty.

Edward Mitchell, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for collector and government,—

Contended that, under the peculiar agreement shown by the evidence in this case, the completed gun-stock was, for duty purposes, only to be considered a part of an importation, the other part of which was to arrive on another vessel, forming together, for all practical purposes, one importation of a completed shotgun; that the manufacture was complete, and nothing remained to be done after importation to make the merchandise a completed shotgun except to put them together, which could be done by any person; that they had been manufactured wholly and completely before importation, and adapted to be put together by the manufacturers before shipping; that the mere shipment of the completed shotguns under this arrangement, in two separate parts, was only a cunningly-devised scheme to evade the payment of the lawful duty upon completed shotguns, which evinced a very low standard of commercial morality; and that the duty was properly assessed by the collector upon the merchandise in question under paragraph 170 of the tariff act of October 1, 1890. (S. S. 10573—G. A. 223.)

LACOMBE, Circuit Judge, (*orally.*) The question of intention does not enter into this case at all, provided the importers have done no more than what, under the terms of the tariff, they may do. Such is the doctrine of the *Luckemeyer* and *Farwell Cases*, referred to on the argument. Whether their object was to make their goods more readily salable in this way, or by this particular method of importation to secure the entrance of the goods here at a lower rate of duty than they would otherwise have to pay, is wholly immaterial, provided that what they have done is within the terms of the tariff act. Now, there is no evidence that these articles were ever "assembled" or brought together with the gun-barrels on the other side. There is no finding to that effect by the appraisers; and, if there were such a finding of fact, I should be constrained to reverse it, because there is no evidence in the record to support it. I do not by this mean to imply that that single fact would be controlling of the case if it were here; it is enough to say that it is not here. For all that appears, the gun-stocks may have been bought from one manufacturer, and the gun-barrels from another. They came here under a provision of the tariff act which lays a duty upon "sporting, breech-loading shotguns," and lays a separate and a different duty upon the parts of which those sporting, breech-loading shotguns are composed, as "manufactures in whole or in part of metal." It can be fairly assumed that congress by that very terminology meant to allow importers who choose to do so, to bring in fragments of a combination article by different shipments, and then to employ domestic labor in putting them

together. It may have been intended to induce importers to employ to that extent the labor of this country, instead of having the article combined abroad. We cannot tell, of course, what operated upon the minds of the framers of that particular passage of the act. We can only deal with their language as they have set it down for us, and under that language it seems very clear that there is nothing in this shipment except "gun-stocks mounted,"—articles which are properly described in the tariff, only by the phrase "manufactures composed wholly or in part of metal;" and they should therefore pay that duty, and no other. The decision of the board of appraisers is reversed.

In re ENSLOW.

(District Court, D. South Carolina. March, 1891.)

HABEAS CORPUS—DUE PROCESS OF LAW—STATE PRACTICE.

Where a person is arrested on a peace-warrant from one state judge, and committed to jail after hearing before another judge acting within his jurisdiction and proceeding in accordance with state practice, he cannot be released by the federal district court on *habeas corpus*, as being deprived of his liberty without due process of law, contrary to Const. U. S. Amend. 14.

Habeas Corpus.

C. B. Northrop, for petitioner.

G. Lamb Buist, for the sheriff.

SIMONTON, J. A petition was filed in this case, praying that a writ of *habeas corpus* issue directing the sheriff of Charleston county to produce the body of the petitioner, who is imprisoned in violation of the constitution of the United States. The specific violation charged is that he is deprived of his liberty without due process of law. Amendment 14. The sheriff produces the body of the petitioner, and for return to the writ says that he had been in his custody under a warrant from Trial Justice WILLIMAN under a peace-warrant, and that, while so in custody, he was brought before the Honorable J. I. NORTON, the presiding judge of the court of common pleas for his county; that his honor was pleased to order, after hearing the cause, that the prisoner be recommitted to the jail of Charleston county. The prisoner being in jail under state process, having no special privilege or immunity, I cannot entertain this application unless he be imprisoned in violation of the constitution of the United States in the point charged. But the return shows that he was committed by a state judge after hearing. This seems to me to be due process of law. The state judge acted upon a matter within his jurisdiction, and passed upon the construction of the state law and practice. See *Ex parte Ulrich*, 43 Fed. Rep. 663. Were I to review his action, it would give to this proceeding the effect of a writ of error, which cannot be done. *Ex parte Parks*, 93 U. S. 18; *Ex parte Carll*, 106 U. S. 521, 1 Sup. Ct. Rep. 535. Remand the prisoner.