

dismiss it, alleging that this court is without lawful jurisdiction thereof. The appeal was claimed under the seventh section of the act establishing this court.¹ If we assume that on a bill to restrain infringements the usual decree for a perpetual injunction and an accounting is within the purview of this section, yet it seems demonstrable that this appeal was not reasonable, and, indeed, never could have been taken. To hold otherwise would be in fact saying that parties may suffer the 30 days expressly limited by such seventh section, within which appeals may be taken, to go by, and then revive the right by motions for rehearing, made only to be dismissed; and it does not affect the reasoning that in the present case there was no right of appeal at the time the injunction was granted. Without embarrassing ourselves with discussing questions which might be suggested with reference to the effect of refusals to dissolve restraining orders or injunctions granted *ex parte*, or in vacation, it is very clear that this order, refusing to dissolve an injunction passed after hearing the merits of the cause and needing no further action to maintain its efficiency, was not an interlocutory order or decree of continuance within the meaning of the statute in question. The appeal is dismissed, with costs on the motion for the appellees.

CITY OF BOSTON v. BEAL.

(Circuit Court, D. Massachusetts. July 25, 1892.)

No. 2,958.

NATIONAL BANKS—STATE TAXATION OF SHARES—INSOLVENCY.

Pub. St. Mass. c. 13, §§ 8-10, provide that shares of stock in all banks, state and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property. *Held*, that no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared; for, there being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank, which belong to its creditors, and thereby violate the rule that a state cannot tax the capital stock of a national bank.

In Equity. Bill by the city of Boston against Thomas P. Beal, as receiver of the Maverick National Bank, to recover taxes. Heard on bill and answer. Bill dismissed.

¹ Act March 8, 1891, (Supp. Rev. St. 901, § 7,) reads as follows: "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken; under the provisions of this act, to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal."

T. M. Babson, for complainant.

Hutchins & Wheeler and *Frank D. Allen*, U. S. Atty., for defendant.

COLT, Circuit Judge. This is a bill in equity, brought by the city of Boston against Thomas P. Beal, receiver of the Maverick National Bank, to recover the sum of \$12,096 for taxes due October 1, 1891. The assessment was made under chapter 13, Pub. St. Mass. §§ 8-10, which are as follows:

"Sec. 8. All the shares of stock in banks, whether of issue or not, existing by authority of the United States or of the commonwealth, and located within the commonwealth, shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere, in the assessment of all state, county, and town taxes imposed and levied in such place, whether such owner is a resident of said city or town or not. All such shares shall be assessed at their fair cash value on the first day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate, and no greater, than that at which other moneyed capital in the hands of citizens, and subject to taxation, is by law assessed. And the persons or corporations who appear from the records of the banks to be owners of shares at the close of the business day next preceding the first day of May in each year shall be taken and deemed to be the owners thereof for the purposes of this section.

"Sec. 9. Every such bank or other corporation shall pay to the collector or other person authorized to collect the taxes of the city or town in which the same is located, at the time in each year when other taxes assessed in the said city or town become due, the amount of the tax so assessed in such year upon the shares in such bank or other corporations. If such tax is not so paid, the said bank or other corporation shall be liable for the same; and the said tax, with interest thereon at the rate of twelve per cent. per annum from the day when the tax became due, may be recovered in an action of contract brought by the treasurer of such city or town.

"Sec. 10. The shares of such banks or other corporations shall be subject to the tax paid thereon by the corporation or by the officers thereof, and the corporation and the officers thereof shall have a lien on all the shares in such bank or other corporation, and on all the rights and property of the shareholders in the corporate property for the payment of said taxes."

The case was heard upon bill and answer. The bill alleges, in substance, that on or about September 22, 1891, a demand for the payment of the tax was mailed by the collector of the city of Boston to the bank, and that on October 19th the tax was committed to him by the assessors for collection; that the tax bills bear date October 1st, and, if not paid by November 1st, bear interest from the latter date; that on November 2d the defendant, Beal, was appointed receiver of the bank, and that all its assets and property have ever since been in his hands; that by virtue of the statute the bank became liable for the tax if it had not become insolvent, and said Beal had not been appointed receiver, and the city treasurer could have recovered the tax, with interest at the rate of 12 per cent. per annum, in an action of contract; and that it has a valid claim against the bank for the amount of said tax and interest. The bill prays that the court will order the receiver to pay over to the collector its proportionate share of dividends as they may be ordered to be paid to creditors by the comptroller.

The answer alleges, among other things, that said bank shares were not assessed at their fair cash value, and that on the 1st day of May, 1891, the market value of the shares, after deducting the real estate owned by the bank, as shown by actual sales, was \$240 per share, but that the value of said shares, based upon the actual value of the assets of the bank on May 1, 1891, as would have appeared had the bank been wound up on that day, was much less than \$240 per share, the difference being due to the ignorance of the public of the true state of the assets of the bank; that on November 1st, the comptroller being satisfied that the bank was insolvent, ordered its doors to be closed, and a bank examiner to take possession of its property, and that subsequently the defendant was appointed receiver, and took possession of the assets of the bank, and is now engaged in converting them into money, for equal distribution among the creditors of the bank; that such funds are not liable for taxes assessed upon the shareholders, and that the plaintiff has no claim proveable against such funds.

This suit was brought February 6, 1892, several months after the bank became insolvent. It was decided in *McCulloch v. Maryland*, 4 Wheat. 316, that a state law taxing a national bank was unconstitutional, on the ground that the power to tax implied the power to destroy. It has been held, however, by the supreme court, that a statute similar to that of Massachusetts was not unconstitutional, for the reason that such a tax is not a tax upon the capital of the bank, but a tax upon the shareholders on account of their shares. *National Bank v. Com.*, 9 Wall. 353; *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. Rep. 198; *Railroad Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. Rep. 533.

The only question which arises in this case is whether, under the state of facts here presented, the receiver is liable. It appears that at the time this suit was brought the assets of the bank were in the hands of a receiver, and that the property representing the capital stock had been swept away. This tax, therefore, if held to be valid, is not a tax upon the shareholders, but a tax upon the assets of the bank which belong to the creditors. If the tax is paid by the bank, it can have no lien upon the shares of stock for repayment, as provided by section 10 of the statute above cited, because the property representing such shares has ceased to exist. Under these circumstances, I do not think that the receiver can be held liable for this tax, or that it is a provable claim against the assets in his hands. This case cannot be said to come within the reasoning of the rule laid down in *National Bank v. Com.*, *supra*. If the action against the bank under the statute makes the bank the agent of the state to collect the tax, or if the action is to be considered in effect a form of trustee process for attaching the funds of the shareholders in the hands of the bank, it is too late to bring suit after the funds are no longer in existence from which the bank can reimburse itself. Bill dismissed, with costs.

UNION PAC. RY. CO. *et al.* v. CHICAGO, R. I. & P. RY. CO.

UNION PAC. RY. CO. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 19, 1892.)

No. 16.

1. RAILROAD COMPANIES—CONTRACT—ULTRA VIRES—JOINT USE OF BRIDGE AND TERMINALS.

The general rule that a railroad company must itself exercise its powers and perform its public duties does not render *ultra vires* a contract by the Union Pacific Company, whereby, for 999 years, it let another company into the joint use and occupancy of its bridge across the Missouri river, and of its terminal facilities at Omaha, together with about seven miles of its track, when such joint use does not interfere with the present or prospective use thereof by the lessor, or with the discharge of the duties it owes to the government under the provisions of its charter. 47 Fed. Rep. 15, affirmed.

2. SAME—REGULATIONS FOR JOINT USE—UNION PACIFIC COMPANY—DUTIES TO GOVERNMENT.

A provision in the contract that schedules of rules for the movement of engines and trains shall be made, which will accord equal rights and privileges to the trains of the same class belonging to each party, and, if not agreed upon, shall be fixed by referees, does not disable the Union Pacific Company from exercising any powers necessary to the discharge of its public duties, especially as it expressly reserves to itself the absolute control, through its own superintendent, of the operation of every train that enters upon these tracks.

3. SAME—CHARTER POWERS—PUBLIC POLICY.

Act Feb. 24, 1871, (16 St. at Large, p. 430,) "for the more perfect connection of any railroads that are or shall be constructed to the Missouri river," authorizes the Union Pacific Company, in constructing its bridge at Omaha, to issue bonds thereon, and declares that "for the use and protection of said bridge and property" the company "shall be empowered, governed, and limited" by the act of July 25, 1866, (14 St. at Large, p. 244.) The latter act authorizes the building of a bridge across the Mississippi at Quincy, Ill., and declares that "all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge" for a reasonable compensation to its owners. Various other acts of congress authorizing the construction of bridges contain similar provisions for joint use. *Held* that, in view of the general policy thus evinced to promote continuous lines of transportation and to foster competition, the Union Pacific Company was fairly empowered to make the contract in question, especially as one main purpose thereof was to furnish a connecting link between the parts of a road owned by the other company, which would thus form a continuous line from Chicago to Denver.

4. SAME—EXECUTION OF CONTRACT—RATIFICATION BY DIRECTORS AND STOCKHOLDERS.

The charter of the Union Pacific Railroad Company (12 St. at Large, p. 489) declares (section 1) that "the stockholders shall constitute the body politic and corporate," and provides that at any regular meeting called for that purpose they shall have power to make by-laws touching "all matters whatsoever which may appertain to the concerns of said company." In pursuance of this authority, the stockholders passed a by-law giving the board of directors the "whole charge and management of the property," and authorized it to delegate to the executive committee power to do any acts which the board itself might do. The board thereafter authorized the executive committee to exercise all the powers of the board when the board was not in session. *Held*, that the executive committee had full authority to execute a contract letting another railroad into the joint use of the company's bridge across the Missouri, and its terminals at Omaha; and such contract, having been approved by the stockholders at a regular meeting, was binding on the company, even though never ratified by a formal resolution of the board of directors; and it is immaterial that 5 of the 20 directors are appointed by the government, and not by the stockholders. 47 Fed. Rep. 15, affirmed.

5. SAME—ESTOPPEL—PARTIAL PERFORMANCE.

The fact that this contract was within the corporate powers of the Union Pacific Company, and was executed with all proper formalities and delivered to the other company, together with a formal resolution of approval by the stockholders, constituted *prima facie* evidence that it was executed with lawful authority; and after carrying it out for seven months, and receiving the stipulated monthly rent-