## ALLEN v. DILLINGHAM.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1894.)

No. 138.

NEGLIGENT KILLING—ACTION AGAINST RECEIVERS.

A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. Tex. art 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents. Turner v. Cross, 18 S. W. 578, 83 Tex. 218, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Intervening petition of Evelyn Allen, individually, and as next friend of Ella Allen, a minor, against Charles Dillingham, as receiver of the Houston & Texas Central Railway Company. Respondent demurred, and upon demurrer the petition was dismissed. The petitioner thereupon appealed.

This is an intervening petition in equity against Charles Dillingham, as receiver of the Houston & Texas Central Railway Company, filed in the receivership cause February 24, 1890, and was brought by the widow and children of a deceased employe of the receiver, for compensation out of the fund in the court's custody, to be received in the way of damages that had accrued to them from injuries resulting in the death of the deceased. The petition, as amended, in its stating part, in addition to appropriate averments that the death of the deceased was caused by negligence of the receiver or his agents, without contributive negligence on the part of the deceased, contains these allegations: "In 1885 the Houston and Texas Central Railroad was placed in the hands of a receiver on a bill brought in the United States circuit court for the eastern district of Texas by the Southern Development Company against the Houston and Texas Central Railway Company et als., asserting a lien upon the corpus of the property by reason of the diversion of current earnings from the payment of current expenses, and indebtedness of $300,000 or $400,000, and insolvency of the company, all of which was admitted by answer filed in the case. The name of Benjamin C. Clark was presented by the parties as a proper person to appoint as one receiver, and the court was asked to designate another, and thereupon designated Charles Dillingham, both of whom, Clark and Dillingham, were appointed receivers. Thereafter Nelson S. Easton and James Rintoul, trustees under the first mortgage, and the Farmers' Loan and Trust Company, trustees on other mortgages bearing on said railroad company's property, filed independent bills for foreclosure in the same court, and a general demurrer to the bill of the Southern Development Company. In June, 1886, the demurrer was heard before Mr. Circuit Justice Woods and Circuit Judge Pardee, and was sustained, and thereupon an order was entered dismissing the bill of the Southern Development Company, and appointing Charles Dillingham and the trustees under the first mortgage, Rintoul and Easton, receivers, in accordance with the prayer contained in the bill for foreclosure above referred to. The foreclosure suits were put at issue, came on for hearing in 1887, and decrees were rendered foreclosing all the mortgages bearing upon the Houston and Texas Central Railway property, except the first mortgage upon the Waco Branch, and a sale was ordered. At the sale in the following year, Mr. Frederick Olcott, representing a reorganization committee, purchased the main line and property attached, which sales were thereafter duly confirmed. In April, 1889, ex propria, the court entered orders directing a turning over of the property that had been sold, and looking to the termination of the receivership. Immediate execution of these orders was opposed in the interest of large floating debt creditors, whose interventions had not been disposed of, and

was complicated by the represented fact that the purchasers of the property, desiring to form a new company, had been delayed by the necessity of obtaining some legislative action. The turning over of the property was further complicated by the institution of a suit by Carey et al., old stockholders of the Houston and Texas Central Railway Company, who filed an apparently independent bill to annul the former decrees of foreclosure and the sale thereunder, on the ground of want of jurisdiction of the court, and fraud of parties in obtaining the original decree of foreclosure. And petitioners further show the court that said order of the court directing the property to be turned over to the purchaser was made in or prior to the month of April, 1889; that, by proceedings duly had in the said court about that time, the said Rintoul and Easton were discontinued as receivers in the above consolidated cause, and the said Charles Dillingham continued as receiver, with the same rights, powers, and privileges, and subject to the same duties and liabilities, as theretofore pertained to said joint receivers; and ever since then the said Charles Dillingham, as receiver, under authority of the order of appointment, has had the custody, control, and management of the properties of said railway company, and run and operated the railroad thereof as a common carrier of passengers and freight for hire; that on, to wit, the 1st day of August, 1889, the purchasers of the property of the Houston and Texas Central Railway Co., as aforesaid, organized themselves into a railroad corporation under the general laws of the state of Texas, by the name of the Houston and Texas Central Railroad Company, and on the said day and date aforesaid articles of incorporation were duly filed in the office of the secretary of state of Texas, and afterwards, on, to wit, September 12, 1889, the said railroad corporation so created was organized, and elected said Charles Dillingham the president thereof, and so he has ever since been; that while said receivership has been continued, through necessity, beyond control of this court, yet, ever since the aforesaid purchase, confirmation, and incorporation of said new railroad company, the property thereof has practically been in its hands, through the said Charles Dillingham as its president and agent, and run and operated, controlled and managed, largely by its directions, and for the benefit of the owner thereof, although held by said Charles Dillingham, from necessity, in his official capacity, as receiver of this court; and since said confirmation of sale the original purposes of the receivership have been entirely accomplished, and the official custody, control, and management of the property by said Charles Dillingham, as receiver, have been real, but formal only, and permitted by the court only through circumstances beyond its prevention, as hereinbefore shown."

The appellee (respondent below) demurred generally, and upon the hearing of the demurrer the intervening petition was dismissed absolutely. The petitioners prayed, in open court, at the same term, that an appeal be allowed, which prayer was granted, and they duly filed the required appeal bond, and have brought the case here upon the following assignment of error, namely: "Afterwards, on the 15th day of March, A. D. 1893, come the above interveners and appellants, and say that in the records and proceedings aforesaid there is manifest error, in this, to wit: that the petition in intervention, as amended by said interveners, and the matters therein contained, are sufficient in law for the said interveners to have and maintain their aforesaid action thereof against the said Charles Dillingham, as receiver. There is also error in this, to wit: that by the records aforesaid the owners of the property in the hands of said Charles Dillingham, as receiver, would have been liable for the death of the deceased; and, under the circumstances appearing in the petition, the court is bound in equity and good conscience to charge the fund in the receiver's hands with liability for his negligences, just as would be were the said property in the hands of the owner; wherefore, by the law of the land, the said petition in intervention ought not have been dismissed, and the said interveners (appellants herein) pray that the decree aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things that they have lost by occasion of said decree," etc.

H. F. Ring and Pressley K. Ewing, for appellant.

The question to be determined upon the foregoing assignment is whether the receiver, as such, is liable to respond, through the fund in his hands, in damages, by way of compensation, for injuries resulting in death.

I. Where a federal court has obtained jurisdiction of a proceeding in equity, seeking relief upon a state statute, which, as construed by state decisions, entitles the petitioner to the relief, subsequent inconsistent state decisions cannot affect the right of the federal court to its independent judgment on the question involved; and, as a question to be determined by the independent judgment of this court, we submit it is too clear to doubt that the statutes of Texas did give a cause of action for death injuries against a receiver of a railroad.

The later Texas decisions are not binding upon this court. Rev. St. U. S. § 721; 1 Stat. 92; Judiciary Act, § 34; Burgess v. Seligman, 2 Sup. Ct. 10, 107 U. S. 20–38; Bucher v. Railroad Co., 8 Sup. Ct. 974, 125 U. S. 555–585; Fost. Fed. Pr. § 375; Douglass v. Pike Co., 101 U. S. 677–688; Sharon v. Terry, 36 Fed. 337; Trust Co. v. Debolt, 16 How. 416; Pease v. Peck, 18 How. 595, 601; Town of Thompson v. Perrine, 103 U. S. 806–820; Fairfield v. County of Gallatin, 100 U. S. 47–55; Elmendorf v. Taylor, 10 Wheat. 160; Groves v. Slaughter, 15 Pet. 498; Ober v. Gallagher, 93 U. S. 199–208; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22, (compare with Yoakum v. Selph, 19 S. W. 145, 83 Tex. 607, and Turner v. Cross, 18 S. W. 578, 83 Tex. 231;) Clark v. Dyer, 16 S. W. 1061, 81 Tex. 343.

The statutes of Texas did give an action against a receiver for death injuries. Rev. St. Tex. arts. 2899, 3138, and General Provisions, § 2; Merkle v. Bennington Tp., 24 N. W. 776, 58 Mich. 156; Haggerty v. Railroad Co., 31 N. J. Law, 349; Bolinger v. Railroad Co., 31 N. W. 856, 36 Minn. 418; Railway Co. v. Shacklett, 10 Ill. App. 404; Hayes v. Williams, (Colo. Sup.) 30 Pac. 352; Beach v. Bay State Co., 6 Abb. Pr. 415, 16 How. Pr. 1, 27 Barb. 248; Soule v. Railroad Co., 24 Conn. 577; Lamphear v. Buckingham, 33 Conn. 237; also, Pierce v. Railway Co., 51 N. H. 591; Hall v. Brown, 54 N. H. 497; Meara v. Railroad Co., 20 Ohio St. 137; Schott v. Harvey, 105 Pa. St. 229; Little v. Dusenberry, 46 N. J. Law, 614; Lyman v. Railway Co., 10 Atl. 346, 59 Vt. 167; Erwin v. Davenport, 9 Heisk. 45; McNulta v. Lockridge, (Ill. Sup.) 27 N. E. 452; Railway Co. v. Cox, 12 Sup. Ct. 905, 145 U. S. 593; Sloan v. Railway Co., 16 N. W. 331, 62 Iowa, 728; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 26 Fed. 12; Potter's Dwar. St.; Willis v. Owen, 43 Tex. 48.

II. By the Texas statutes giving action for death injuries, a valid state law imposed a duty upon the owner, the railway company, in the management and operation of the railroad; and by the second section of the act of congress passed March 3, 1887, a federal receiver was placed upon the same plane of duty, and substituted to the same liability in this respect, as pertained to the owner, the railway company.

Rev. St. Tex. art. 2899; Act Cong. March 3, 1887, (24 Stat. 554; Eddy v. La Fayette, 4 U. S. App. 247, 1 C. C. A. 441, and 49 Fed. 807; Central Trust Co. v. St. Louis, A. & T. Ry. Co., 40 Fed. 427; Railway Co. v. Cox, 12 Sup. Ct. 905, 145 U. S. 593; Clark v. Dyer, 16 S. W. 1061, 81 Tex. 339; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22.

III. If it be true that no independent right of recovery is given by the statutes of Texas against a receiver for death injuries, yet where, as in this case, the petition for compensation is addressed to the court of equity, having jurisdiction of the receivership fund, and the proceeding is one in rem, seeking relief only from the fund itself, the court of equity will treat the receiver, for the purposes of relief, as standing in the relation of owner, and will hold the fund liable to respond for all negligences, whether grounded upon statutes or the general law, which would have imposed personal liability upon the owner if in charge; and especially will this relief be granted where, as appears from the petition in this case, the receiver, without exclusive custody as such, controlled and operated the property, in effect, as agent of the owner, but merely from necessity accounted as receiver.

20 Am. & Eng. Enc. Law, p. 378; McNulta v. Lochridge, 12 Sup. Ct. 11, 141 U. S. 327, 331; Railway Co. v. Geiger, 15 S. W. 214, 79 Tex. 22; Klein v. Jewett, 26 N. J. Eq. 474; and authorities elsewhere cited.

E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, for appellee.

The question to be determined in this cause is whether the appellant had a right of action against the appellee, Charles Dillingham, as receiver of the Houston & Texas Central Railway Company, for injuries resulting in death while he was operating and managing said road as receiver.

Appellee contends, where a federal court has jurisdiction of a proceeding where a party seeks relief upon a state statute, that the construction placed upon such statute by the courts of last resort of said state is binding, and will be followed by the federal courts, without considering whether the statute was originally construed correctly or soundly.

The latest Texas decisions on the construction and interpretation of the state statutes are binding, and will be followed by the federal court. Rev. St. U. S. § 721; Lavin v. Bank, 1 Fed. 650; State v. Grand Trunk Ry., 3 Fed. 889; Bank of Sherman v. E. M. Apperson & Co., 4 Fed. 25; McCall v. Town of Hancock, 10 Fed. 9; Schreiber v. Sharpless, 17 Fed. 589; Investment Co. v. Parrish, 24 Fed. 200; Buford v. Holley, 28 Fed. 685; Myrick v. Heard, 31 Fed. 243; New Orleans Waterworks Co. v. Southern Brewing Co., 36 Fed. 833; Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co., 42 Fed. 376; Gray v. Havemeyer, 3 C. C. A. 497, 53 Fed. 174; Percy v. Cockrill, 4 C. C. A. 73, 53 Fed. 872; Society v. Watts, 1 Wheat. 289; Jackson v. Chew, 12 Wheat. 153; Fullerton v. Bank, 1 Pet. 604; Green v. Neal, 6 Pet. 291; Livingston v. Story, 11 Pet. 398; Harpending v. Dutch Church, 16 Pet. 493; Porterfield v. Clark, 2 How. 125; Rowan v. Runnels, 5 How. 134; Luther v. Borden, 7 How. 1; Nesmith v. Sheldon, Id. 812; Williamson v. Berry, 8 How. 559; Van Rensselaer v. Kearney, 11 How. 318; Moore v. Brown, Id. 435, 436; Webster v. Cooper, 14 How. 504; Beauregard v. City of New Orleans, 18 How. 497; League v. Egery, 24 How. 266; Amey v. Mayor, Id. 364; Bank v. Skelly, 1 Black, 436; Conway v. Taylor, Id. 621; Leffingwell v. Warren, 2 Black, 603; Gelpcke v. City of Dubuque, 1 Wall. 175, 212, 219; Supervisors of Carroll Co. v. U. S., 18 Wall. 82; Town of South Ottawa v. Perkins, 94 U. S. 260; Davie v. Briggs, 97 U. S. 637; Andreae v. Redfield, 98 U. S. 235; Amy v. Dubuque, Id. 471; Fairfield v. County of Gallatin, 100 U. S. 52; Taylor v. Ypsilanti, 105 U. S. 71; Burgess v. Seligman, 2 Sup. Ct. 10, 107 U. S. 34; Bendey v. Townsend, 3 Sup. Ct. 482, 109 U. S. 668; Bauserman v. Blunt, 13 Sup. Ct. 466, 147 U. S. 647; Turner v. Cross, 18 S. W. 578, 83 Tex. 231. The statute of Texas did not give an action against a receiver for death injuries. Rev. St. Tex. art. 2899; Turner v. Cross, 18 S. W. 578, 83 Tex. 231.

Before PARDEE, Circuit Judge, and BOARMAN and TOULMIN, District Judges.

TOULMIN, District Judge. The judgment of the circuit court in this case must be affirmed, on the authority of Turner v. Cross, 83 Tex. 218, 18 S. W. 578; and it is so ordered. Affirmed.

NOTE.

The case of Turner v. Cross, 83 Tex. 218, referred to above, is reported as follows in 18 S. W. 578:

TURNER v. CROSS et al.

(Supreme Court of Texas. Feb. 5, 1892.)

NEGLIGENT KILLING—ACTION AGAINST RECEIVERS.

A receiver is not a "proprietor, owner, charterer, or hirer," within Rev. St. art. 2899, giving a right of action for injuries resulting in death caused by the negligence of the proprietor, owner, charterer, or hirer of a railroad, etc., or by the negligence of their servants or agents.

Appeal from district court, Williamson county.

Action by S. S. Turner against H. C. Cross and George A. Eddy, as receivers, for damages on account of injuries resulting in the death of her son. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Parker, for appellant. Fisher & Townes, for appellees.

STAYTON, C. J. Appellant brought this action to recover damages for an injury received by her son, which she alleges was caused by the negligence of the receivers, and resulted in his death, and it is agreed that the only question to be decided is: As the law (article 2899, Rev. Civ. St.) stood on the 22d day of December, 1889, is the receiver of a railroad liable as such for injury negligently inflicted upon and resulting in the death of an employe, when the injury is sustained while the railroad is being operated by the receiver? In other words, is the receiver of a railroad operating the road, within the enumeration of the statute, either as proprietor, owner, charterer, or hirer? The court below held not, and therefore sustained a demurrer to a petition, the sufficiency of which is not otherwise questioned. It must be conceded that the action cannot be sustained unless it is given by the statute, and, as it is not claimed that the receivers are liable personally, the only statute which has application to the case is the following: "An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steam-boat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents." Rev. St. art. 2899. The action is not against the railway company whose property was in the hands of the receivers, and no inquiry arises whether in a case brought against the company the receivers, under any circumstances, might be deemed its servants or agents. To maintain the action it is necessary to hold that a receiver operating a railway under the appointment and control of a court is, within the meaning of the statute, "the proprietor, owner, charterer, or hirer of any railroad." By "hirer" we understand to be meant one who by contract acquires the right to use a thing belonging to another, and by "charterer" we understand to be meant one who by contract acquires the right to use a vessel belonging to another; and, as the statute embraces subjects to which these terms may be applied, we are of opinion that they were used in their ordinary sense, and we do not understand appellant to contend for any other meaning for them. But it is contended that the receivers were, within the meaning of the statute, "proprietors" or "owners," while appellees contend that these words cannot be applied to any person not holding property in his own right, although conceding that proprietorship or ownership, within the meaning of the statute, may exist without absolute title. It is insisted by appellees that the statute in question is in derogation of the common law, and must therefore be construed strictly; but the rule here invoked has been abolished by statute, which provides that "the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes, but the said statutes shall constitute the law of this state respecting the subjects to which they relate, and the provisions thereof shall be liberally construed, with a view to effect their objects and to promote justice." Rev. St. Gen. Prov. § 3. The statute in reference to the construction of statutes contains the following: "The ordinary signification shall be applied to words, except words of art, or words connected with a particular trade or subject-matter, when they shall have the signification attached to them by experts in such art or trade, or with reference to such subject-matter." "In all interpretations the court shall look diligently for the intention of the legislature, keeping in view at all times the old law, the evil, and the remedy." Rev. St. art. 3138. These are but statutory declarations of rules of construction which had long been recognized by courts, and the statute but emphasizes their importance.

It is the duty of a court to give to language used in a statute the meaning with which it was used by the legislature if this can be ascertained;

and to do this, if the words used be not such as have a peculiar meaning when applied to a given art or trade with reference to which they are used in the statute, the only safe rule is to apply to them their ordinary meaning, for the legislature must be presumed to have used them in that sense in which they are ordinarily understood; and if, so applying them, the legislation in which they are found seems to be harsh, or not to embrace and give remedies for acts for which remedies ought to be given, the courts, for such reasons, are not authorized to place on them a forced construction for the purpose of mitigating a seeming hardship, imposed by a statute, or conferring a right which the legislature had not thought proper to give. It is the duty of a court to administer the law as it is written, and not to make the law; and however harsh a statute may seem to be, or whatever may seem to be its omission, courts cannot, on such considerations, by construction sustain its operation, or make it apply to cases to which it does not apply, without assuming functions that pertain solely to the legislative department of the government. It may be difficult to perceive a good reason why an action should not exist for an injury resulting in death, caused by the negligence of a receiver or his servants while operating a railway under order of court, as for an injury to a passenger not resulting in death, and subject to the same restrictions as to the manner and fund from which a judgment recovered should be satisfied; but this furnishes no reason why the right of action should exist in the one case and not in the other, where in the one the right does not exist unless given by statute, while in the other the right of action exists without a statute conferring it." If a receiver, within the meaning of the statute, is either a "proprietor" or "owner," then the ruling on the demurrer was wrong. If he is not, it was right. A receiver is an officer of the court that appoints him, when the law takes possession of the property to which the receivership relates, and, in cases of receiverships of railway property under the orders of the court appointing them, receivers often operate railroads, and assume the duties, burdens, and liabilities ordinarily imposed by law upon common carriers, in addition to the ordinary duties attaching to the position; but at all times they are only the agencies of the court, subject to its orders, and having no personal interest in the property in their hands resulting from the existence of the receivership, though responsible officially for the proper management and custody of property confided to their care, and, as other persons, personally responsible for their own unlawful acts working injury to others, but not so responsible for the negligence or unlawful acts of servants they may be compelled to employ in the business confided by the court to their management and control. When lawfully appointed, they are not the representatives of the company or persons when property may be placed in their possession and under their management, though they, in some cases, may be subjected to liability for charges arising under the permission of the courts appointing them, or from the negligence of themselves and their employes.

Examples of such charges upon railway companies' property in the hands of receivers are of almost daily occurrence in these cases in which the receipts of railway business, which are the property of a railway company in the hands of a receiver, are appropriated to the liquidation of claims arising from breach of duty as common carriers; but can such relations as they bear to property placed in their custody and management justify a holding that they are either the "proprietors" or "owners" of a railroad, within the meaning of the statute? One who has the legal right or exclusive title to anything is said to be a "proprietor." Webst. In many instances, if not usually, the word is the synonym of the word "owner." Abb.; Bouv.; Webst. The "owner" is said to be "he who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with as he pleases, even to spoil or destroy it, so far as the law permits, unless he be prevented by some agreement or covenant which restrains his right." Bouv. "One who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not." Webst. Both words convey the idea of property in the thing in right of the person who is said to be the proprietor or owner, and exclude that

or a mere possessor in the right of another, although the possession may be coupled with the duty or obligation to take care of, or even to use, the thing in that other's right. Both words are doubtless often used to express right to property in a thing less than absolute or exclusive right, but when this occurs it will ordinarily appear from the context, and in all such cases the person holds for himself and in his own right; and, as stated in brief of counsel: "The right of such a person to the possession and control springs, not from an act to which the concurrence or consent of the owner is not required, as in the appointment of a receiver, but from the direct act of the owner or proprietor, who thereby clothes the person placed in the possession and control with the right to operate the same for his own benefit." This may be illustrated by reference to cases. In Pierce v. Railroad Co., 51 N. H. 591, it appeared that the Concord & Portsmouth Railroad was operated by the Concord Railroad under a lease for 99 years, and a question arose whether it was liable for property destroyed by fire from one of its locomotives, under a statute which provided that "the proprietors of every railroad shall be liable for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine of such road;" and, in view of a statute in force in that state which declared that the term "proprietors of a railroad" should "include the corporation to which any railroad was originally granted, or into whose hands it has subsequently passed, the assignees or trustees to whom any railroad has been mortgaged for the security of a debt, and any company or person to whom it may have been conveyed," it was held that within the meaning of the law the defendant was a proprietor, and, as such, liable. In Hall v. Brown, 54 N. H. 497, an action was brought to recover damages resulting from the obstruction of a highway by a locomotive under a statute which provided that "no such proprietors shall obstruct by their engine, cars, or train any highway more than ten minutes at any one time, under penalty of twenty dollars for each offense to the party delayed thereby." The defendant was not the absolute owner of the railroad, but at the time of the accident the railway was occupied and used by the defendant for his own benefit, and it was held that he was a proprietor, within the meaning of the statute. Many cases are cited under the word "owner," illustrating the use and meaning of that word under a great variety of facts, which show that absolute and exclusive right is not always necessary to ownership; and, on the other hand, that possession, when held in a fiduciary character, does not constitute ownership, unless the relation under which the possession exists be created by the act of one who held dominion, such as, in the ordinary acceptation of the words, is deemed proprietorship or ownership; and it is not believed that any adjudicated case can be found in which it has been held that a person not having a personal interest in or right to property was its proprietor or owner. Abb. Dict.

In the construction of the statute under consideration it is proper, in order to arrive at the intention of the legislature, to consider the association in which the words "proprietor" and "owner" are found; for it ought to be presumed that in enacting the statute, having, as it does, relation to the use of enumerated kinds of property by persons sustaining given relations to it, the legislature was prompted by the same reason to give actions against the persons or corporations to whom the act applies; that it was the intention to give such actions against those who stood in similar relations to property and its use, though the relations may not be of the same degree, rather than to give such rights of action against persons whose relations to properties enumerated and their uses were wholly dissimilar. The importance and propriety of doing this is emphasized when we take into consideration the fact that right of action for injuries resulting in death is given against the persons enumerated in the statute under consideration, even where the injuries result from the "unfitness, negligence, or carelessness of their servants or agents;" while under the second paragraph of the act the persons against whom right of action is given are not made liable for the acts or omissions of their servants or agents. The words "hirer" and "charterer" apply to persons who, in their own rights, are entitled to possess, use, and have the benefits resulting from the use of

the thing hired or chartered, and those rights must be acquired by contract with persons having such dominion over the thing hired or chartered as enables them to confer on the hirer or charterer the right to use the thing hired or chartered, and to have the benefits resulting therefrom. The ordinary meaning of the words "hirer," "charterer," "owner," and "proprietor," as well as that attached to them by judicial decisions, being such that no person can hold either of these relations to property unless he has a personal interest in or right to it, would it not be contrary to all recognized rules of construction to hold that, when they are found thus associated, it was not the intention of the legislature to give to them the meaning ordinarily attached to them, where there is nothing in the statute tending to show that either of the words was used in some other sense? Looking to the character of the property named in the statute, if it was the intention of the legislature —as seems manifest by the language used—to give right of action against all persons and corporations sustaining to the property the relations which the words indicate in cases of injuries resulting in death caused by the negligence or the unfitness, negligence, or carelessness of their servants and agents, then there was necessity to name all the persons against whom right of action was intended to be given, so that any grade of ownership conferring personal right should be brought within the operation of the statute, and it was doubtless for the purpose of deciding all misconception as to the intent of the legislature that "hirers," "charterers," owners," and "proprietors" were named. The manifest purpose of the statute was to give right of action for injuries such as are complained of in this case against those in possession in their own rights of the classes of property named in the statute, when operated by themselves or by servants or agents of their own selection, for whose acts or omissions they ought to be responsible; and the language of a statute ought to be such as to imperatively require it before a court would be authorized to hold that such owners were intended to be made liable, directly or indirectly, for an injury occurring in the use of their property while under the management and control of an officer of a court having power to do with it as the court may direct, and to select his own servants, without regard to the wish of the owner. In cases in which railways are operated by receivers appointed by courts it is held that the receiver becomes a common carrier, subject officially to the liabilities attaching to that business, as well as to the liabilities of a master to the servant; and that, from the public nature of the business, earnings of the property, while in his hands, may be applied to discharge obligations arising in the course of the business; and it is true that in this way the owner of such property is made, through the appropriation of earnings of its property, to pay debts incurred through the negligence of a receiver or his servants. But those cases stand on exceptional ground, and are justified only by public considerations, not now necessary to consider. Such actions as that before us, however, stand on the statute which gives the right of action; and, while it cannot be denied that the legislature might give such right of action against receivers, and require judgment thereon rendered against them to be satisfied out of such funds as may be used to discharge obligations against them in other classes of cases, or even out of the corpus of the property, so far as only the owner's rights might be affected thereby, yet, unless this be done, no court would be justified in holding, under an act which in terms only gives such an action against the proprietor or owner, hirer, or charterer, that it was the intention of the legislature to subject even the earnings of a railway, which, as against all persons not having a right thereto conferred by contract, are as much the property of the owner of the railway as is the road itself, to the satisfaction of a claim based on the negligence of a receiver or his servants. It is ordinarily true that in the construction of a statute effect should be given to every word found in it, and it is contended that under this rule a meaning so essentially different must be given to the words "owner" and "proprietor" as to make the one or the other mean a person who has such right to possession and control as a receiver has; but this does not follow, and the rule is satisfied if the words be given a similar meaning, the difference being in the degree of right to the thing to which owner-

ship or proprietorship relates; and we are not called upon in this case to determine which of these words indicates absolute dominion, and which some lesser rights. The words "agents" and "servants," found in the statute under consideration, in a general sense both apply to persons in the service of another, but in a legal sense an agent is one who stands in the place of his principal,—his representative,—while a servant is one in the master's employment, but not clothed with any representative character.

The rule of construction which requires effect to be given to all the words of a statute never requires a meaning to be given to any word other than that it ordinarily bears, unless this is required by the context, and cases arise where it becomes proper to hold that words are tautological. We need not go beyond the statute under consideration to find an instance of this. This statute gives an action "where the death of a person is caused by the negligence or carelessness of the proprietor," etc., or where death is caused by the "negligence or carelessness of their servants or agents;" and there can be no doubt that the words "negligence" and "carelessness," as here used, mean identically the same thing, for negligence is but the omission of care, and the same is carelessness. It must be borne in mind that actions for injuries resulting in death can be maintained only against such corporations and persons as the statute gives such actions against, and only in favor of such persons as the statutes name, and the courts have no more power to extend its operation by construction not authorized by the words of the statute. If, perchance, an administrator of the estate of a deceased person, or the guardian of the estate of a minor or lunatic, should be required to operate for a time some of the vehicles for transportation of goods and passengers which might belong to such an estate, would it be claimed that the estate represented by him would be liable for an injury resulting in death, caused by the negligence of such an administrator or his servants, or of such a guardian or his servants? To hold that one having possession of and right to control property, as has an administrator, guardian, or receiver, is either the owner or proprietor of the property, would do violence to the ordinary understanding of the meaning of the words, as well as to the meaning attached to them, in a statute like that under consideration, by all judicial decisions.

It is claimed, however, that contrary rulings have been made, and we will briefly refer to the cases relied upon. In Murphy v. Holbrok, 20 Ohio St. 137, an action was brought by an administrator against receivers to recover damages for an injury resulting in the death of his intestate, which it was alleged occurred through the negligence of the agents of the receivers, and they were held officially liable. The action was brought, however, under a statute of the state of Ohio, which gave right of action in such cases against any person or corporation through whose wrongful act, neglect, or fault death resulted, if the injury would have given cause of action to deceased had he lived. Of the correctness of the decision under the statute on which it was based we think there can be no doubt, in so far as the question there decided can have any application to the question involved in this, for the receivers were persons who, under the act, might be made officially to pay damages, for their liability was not made to depend upon their relation to property. Under such a statute as that, they were liable, as receivers are liable, for injuries not resulting in death when caused by negligence in the business confided to their care. Little v. Dusenberry, 46 N. J. Law, 614, was an action brought against a receiver of a railway company's property for an injury resulting in death, based on a statute which provided that "in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages," etc. This, it will be seen, is substantially the same as the Ohio statute, and it was held that under it a receiver was liable officially to such an action, and there can be no doubt of the correctness of the decision, even in the absence of another statute, quoted in the opinion, which provided, when the property of a railroad company was placed in the hands of a receiver by order of the chancellor, that "all expenses incident to the operation of said railroad shall be a first lien on the receipts." The case of Lamphear v. Buckingham, 33 Conn. 238,

was an action brought against trustees in possession of a railroad, and operating it for the benefit of mortgage bondholders, to recover damages for an injury resulting in death. The statute then in force in that state provided that, in case the life of any passenger on a railroad, who was in the exercise of reasonable care, should be lost by the negligence of the railroad, the company should be liable to pay damages, not exceeding $5,000; and it was contended that by the express terms of the statute the right of action was limited to injuries received at the hands of railroad companies, but, on account of another statute, the court said: "The original eighth section of the act of 1853 authorized the action against the railroad company only; but we are of opinion that the act of 1858, which authorized and regulated the surrender of the road and franchises to trustees for the benefit of creditors, subjected the property in the hands of such trustees to liability, and them to suit under this statute." The inference is that, but for the statute referred to, the court would have held the trustees not liable. The case of Lyman v. Railroad Co., 59 Vt. 167, 10 Atl. 346, was one in which an action for an injury resulting in death was brought against a railroad company that was acting as receiver of two other railways, which it was operating in connection with a railroad it had leased, and the injury occurred on the leased road. In the opinion the court said: "If the court of chancery consented that its receiver might step outside his proper functions as receiver of the Vermont & Canada and Vermont Central Railroads, and engage as a lessee in business foreign to the administration of the property in the hands of the court, he stands, as to such business, and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as a receiver, in the sense that he is then an officer of the court, but as a party sui juris, acting as his own principal, and upon his own responsibility. The order of the court, if any, sanctioning his engagement in such business, is available to him in the settlement of his accounts as receiver of the roads in the hands of the court, but not as the gauge of his responsibility to third persons dealing with him." The court, however, does say that he would have been liable had he been in fact a receiver, and not a lessee; and we see no reason to doubt the correctness of this conclusion under the Vermont statute, which gives the right to action for the "rightful act, neglect, or default of any person, either natural or artificial." Erwin v. Davenport, 9 Heisk. 45, was also an action against a receiver to recover damages for an injury resulting in death, and it was held that the receiver, under the averments of the petition, would be personally liable for his own misfeasance; but the case can have no bearing on the question involved in this. We do not find that any other state in the Union has a statute in all respects the same as that in force in this state, and have been unable to find any case in which the question involved in this is considered; but, after holding the case under advisement for some time, in view of the importance of the question involved, as well as its novelty, and after giving to it full consideration, we are constrained to hold that the ruling of the court below was correct. Some judgments have been affirmed by this court that were rendered against receivers officially for damages for injuries resulting in death; but in these cases the question involved in this was neither suggested nor considered, and they cannot be considered as adjudications of the question. If it be desirable to make the property of a railway company liable in actions of this character on account of the negligence of a receiver in whose hands it may be, or on account of the negligence of his servants or agents, the legislature will doubtless so amend the law as to give such liability. The law is peculiar, in that it restricts liability for the negligence of agents and servants to persons and corporations engaged in given lines of business, no more dangerous in many of its branches than are many others in which the liability is made to depend on the wrongful act, unskillfulness, or negligence of the person or corporation to be affected. Whether such discriminations are conducive to the public welfare is a matter for consideration of the legislature. The judgment will be affirmed.

## STATE OF LOUISIANA et al. v. LAGARDE et al.

(Circuit Court, E. D. Louisiana. March 2, 1894.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—FERTILIZERS.
Act La. No. 51 of 1886 required all manufacturers of and dealers in commercial fertilizers within the state to file with the board of agriculture a statement of the ingredients of their several fertilizers, to obtain licenses for their sale, and to place on each package sold a tag, to be furnished by the board, showing that such dealers had complied with the law; and penalties were provided for failure to conform to its provisions. Complainants, as soliciting agents, within the state, of an Illinois manufacturer, were in the habit of sending orders to their principal, and the fertilizer was shipped direct to the purchaser in Louisiana by such principal, and was never in complainants' possession or control. *Held*, that complainants were engaged in interstate commerce, and that such act, as applied to them, was an interference with such commerce, and hence the federal courts will restrain proceedings against them for noncompliance with such act.

2. SAME—INJUNCTION—AGAINST STATE.
The fact that such proceedings against complainants were taken in the name of the state will not affect the right of the circuit court to restrain the proceedings; for the injunction will go against the board of agriculture and its officers, at whose instance the proceedings were had, and not against the state.

3. SAME—AGAINST CRIMINAL PROSECUTIONS.
Whether or not the circuit court has jurisdiction to restrain the law officers of the state from instituting the criminal proceeding provided for by the act in the event of failure to comply with it, it can clearly restrain the board of agriculture, its agents and officers, from instigating any such prosecutions.

This suit was commenced by a petition filed in the civil district court for the parish of Orleans by the state of Louisiana, represented by M. J. Cunningham, attorney general, and Henry C. Newsom, commissioner of agriculture, against E. Lagarde & Son, a commercial partnership doing business in the city of New Orleans, and charging, among other things, said E. Lagarde & Son, as dealers in commercial fertilizers, with carrying on their business in violation and disregard of the provisions and requirements of Act No. 51 of the Laws of Louisiana of 1886. That everything has been done on the part of the state, contemplated by said act, as to the rules established by the bureau of agriculture; the issuance and distribution of circulars; the preparation of tags; the establishment of the necessary regulations for the printing and attaching to bags and packages of fertilizers of the analyses of such fertilizers, seeking to obtain samples, and publishing analyses of fertilizers; the establishment of regulations for obtaining such samples and making the analyses; the adoption of rules and regulations for the collection and deposit of money for tags sold and fines imposed, etc. That said E. Lagarde & Son, for the seasons of 1890–91 and 1891–92, submitted to the commissioner of agriculture the statement required by section 2 of the act, and obtained the certificates and licenses for each of those seasons required by section 3. That said E. Lagarde & Son have failed and refused to submit said statement as to the fertilizers they sell, or propose to sell, during the current season of 1892–93, and they therefore are not authorized, and have no right, to deal in commercial fertilizers in this state, but that, notwithstanding their failure to file the statement and receive the certificate aforesaid, they are and have been so dealing, and are therefore liable to a fine of $1,000 for each violation of the law, which petitioners now sue for. Further, that said E. Lagarde & Son have been guilty of many of said violations, selling without filing said statement and procuring such certificate, exceeding 10 in number, up to the commencement of this suit, etc., and during the past two seasons have sold in this state, as petitioners believe, an average of 3,000 tons of commercial fertilizers, and have sold up to this

time, during the current season (1892-93), 1,000 tons, making 7,000 tons up to this date; that the whole of said amount has been so sold by them in bags, some containing 200 pounds and some 100 pounds, or from 10 to 20 bags to the ton, or, at the lowest, 70,000 bags of fertilizers so sold by them; that they have failed entirely to comply with the positive requirements of section 6 of said act, having failed and refused to attach, or cause to be attached, to each of said bags, one of the tags prepared according to section 5; that the taggage affixed by law is 50 cents a ton, which said E. Lagarde & Son now owe on 7,000 tons heretofore sold by them, or $3,500, up to this time, which petitioners now sue for. Further, that, in addition to said taggage which said E. Lagarde & Son owe, they are liable, under section 6, to a penalty of $150 for each omission to affix a tag to each bag of fertilizer sold by them, making $10,500,000, which petitioners now sue for. And the petition details instances of various and sundry sales alleged to have been made by said E. Lagarde & Son without compliance with the law aforesaid. The petition further charges that said E. Lagarde & Son, and other dealers operating with them, have willfully desregarded the law, and hampered and crippled the bureau of agriculture and the experiment stations; that they have not the right to carry on business or the sale of fertilizers, directly or indirectly, personally or through an agent, or as agents, resident or nonresident, in violation of the law; that unless they are restrained they will continue their unlawful business, and cripple and destroy the efficiency of these important state institutions, and cause petitioners irreparable injury. Wherefore, they pray for order and writ of injunction enjoining said E. Lagarde & Son from further dealing in fertilizers or selling fertilizers in this state until they shall have filed with and submitted to the commissioner of agriculture a written or printed statement as required by section 2 of Act No. 51 of 1886, and procured a certificate required by section 3 of said act, and without placing upon and attaching to each bag or package of fertilizers one of the tags prepared and furnished by the commissioner of agriculture. And they also pray for judgment against E. Lagarde & Son, in solido, in the sum of $10,000 penalties incurred under section 3 of said act, and for the sum of $3,500 taggage or inspection fees, and for $10,500,000 penalties prescribed by section 6 of the act, and for costs and for general relief. On the said petition an injunction issued as prayed for. Thereafter, on motion of E. Lagarde & Son, suggesting their desire to bond the said injunction in accordance with the practice in Louisiana, the said injunction was dissolved, on a bond of $1,000; and thereafter, on petition of defendants, and bond for removal, the cause was transferred to this court, as one arising under the constitution and laws of the United States.

In this court the defendants filed a cross bill, wherein they allege that orators have been, during the years 1890, 1891, 1892, and 1893, engaged in the business or occupation of soliciting agents or drummers in this city and state for the Thompson & Edwards Fertilizer Company, a corporation created and organized under the laws of the state of Illinois, and are citizens of said state, the business of said fertilizer company being the manufacture and sale of commercial fertilizers; that orators' business consists in soliciting orders for said fertilizer company from persons in this state, inducing them to agree to purchase fertilizers from the said fertilizer company, and, when they have so secured an agreeing purchaser for said company, they notify said company by sending to it the name and address of the intending purchaser, and the terms of the sales agreed upon, and said company then ships direct from Chicago, Ill., to the said purchaser in this state, the fertilizers so sold; that "your orators do not manufacture, pack, ship, handle, or even see, said fertilizers, but the same are sold by the said fertilizer company to the purchaser, and shipped direct from the state of Illinois to the purchaser in the state of Louisiana, without your orators ever handling or owning or having any possession or control thereof;" that orators are not, and never have been, the soliciting agents of any other dealer in fertilizers than the said Thompson & Edwards Fertilizer Company; that they do not now have, and never have had, any fertilizer in their possession in this state, or exposed for sale in this state; have never had anything to do with said fertilizers, except as soliciting agents, as above stated; that for their services to said fertilizer

company they receive a commission on sales effected through their efforts. Orators further aver that said Thompson & Edwards Fertilizer Company do not now, and have not during the years 1890, 1891, 1892, and 1893, or during orators' connection with the said firm, kept on hand or exposed for sale any fertilizers in this state. The bill then sets out in full Act No. 51 of the Acts of the General Assembly of the State of Louisiana for the Year 1886, and also the proceedings hereinbefore recited in regard to the institution of the suit. It is further averred that "orators are not manufacturers of or dealers in commercial fertilizers in this state, within the meaning of the provisions of said Act No. 51 of 1886, but that said commissioner of agriculture and the said attorney general claim that your orators' aforesaid business is subject to the provisions of said act. And orators charge that, if said act is applicable to the aforesaid business of orators, then said act is unconstitutional, null, and void, because in violation of the constitution of the United States, and especially of article 1, § 8, cl. 3, thereof; and, in support of this, orators aver that their business is now, and has ever been, that of soliciting agents or drummers of said Thompson & Edwards Fertilizer Company, for the sale and shipment of fertilizers by said company from the state of Illinois to the state of Louisiana, said shipments being made direct from Chicago, Ill., to the purchasers in Louisiana, and received by orators in the original packages; that orators' business or occupation is interstate commerce, and is exempted, by the above referred to provisions of the constitution of the United States, from any such regulations, interference, restriction, burden, or tax as is sought to be imposed by said Act No. 51 of 1886. And orators further say that, if said act be an inspection law, it must be confined to commercial fertilizers manufactured in this state, or prepared for export or actually offered and exposed for sale in this state, and so far as applicable to fertilizers manufactured in other states, and not brought into this state, except after sale, and while in course of direct transportation to the purchaser and consumer, said act is in violation of the commerce clause of the constitution of the United States above referred to. But orators charge that said act is not in any proper or legal sense an inspection law; that said act does not require or provide for any actual inspection or examination of the fertilizers subject to its provisions; that it is purely and simply a revenue act. Orators further charge that said act is in violation of article 29 of the present constitution of the state of Louisiana, in that it embraces more than one object, and of articles 202 to 218 of said constitution, which define and limit the power of the general assembly to impose licenses or any other taxes for purposes of revenue." It is further averred that "notwithstanding the premises, and the patent unconstitutionality and nullity of said Act No. 51 of 1886, the said commissioner of agriculture and the said attorney general threaten to enforce its provisions against your orators, and they threaten to (and, unless restrained by this court, will) bring, not only a number of civil suits against your orators, but will cause to be instituted a number of criminal prosecutions against your orators, and the members thereof, and will cause them to be indicted, arrested, and tried for each sale of fertilizers negotiated by them as the soliciting agents of the said Thompson & Edwards Fertilizer Company as aforesaid, and will so oppress and harass your orators and the individual members by a multiplicity of suits and prosecutions as to break up their aforesaid business, and subject them to irreparable loss and injury, and deprive them of their personal liberty." The prayer is that the defendants may answer, but not under oath, and that a writ of injunction may issue, restraining and enjoining Henry C. Newsom, commissioner of agriculture of this state, and M. J. Cunningham, attorney general of this state, and each of them, their agents, attorneys, and servants, including Charles A. Butler, district attorney, and John J. Finney, assistant district attorney, for the parish of Orleans, state of Louisiana, from instituting or filing, or directing any others to institute, any suit or suits, action or actions, civil or criminal, against your orators, or the individual members thereof, to enforce against them the provisions of Act No. 51 of 1886, to recover the tax or taggage fees therein provided, or the fines or penalties, or any of them, therein imposed, except in this cause and in this court, and from interfering with orators' business by reason of anything contained in said act; and in

the mean time they pray for a restraining order embracing all the relief prayed for.

On notice to show cause why the restraining order prayed for in the cross bill should not issue, the defendants M. J. Cunningham, attorney general, and H. C. Newsom, commissioner of agriculture, appeared by counsel; and thereupon, on their motion, the suit was ordered placed on the law docket of the court, and the application for an injunction and for equitable relief dismissed and abandoned,—consent, however, being given that the cross bill of E. Lagarde & Son should stand as an original bill. Thereupon, the defendants to the bill were ordered to show cause why an injunction pendente lite, as prayed for, should not issue; and, in the mean time an order was entered, restraining the defendants, their agents and servants, and certain prosecuting officers, from instituting further suits, civil or criminal, against the complainants.

On the hearing the complainants presented the affidavits of several dealers in fertilizers, to the effect that the law in question, in its operation, is in no wise an inspection law; that no inspections are made, or ever have been made, under the same; and that there are no officials appointed, or ever have been appointed, or are acting, under said statute, whose duty it is to inspect fertilizers, or to see that said tags required by the act are affixed to the packages of fertilizers offered for sale or sold. Complainants also presented affidavits to the effect that the members and agents of the bureau of agriculture have threatened and are threatening to prosecute complainants, civilly and criminally, in all the parishes of the state, based on every transaction of theirs as the soliciting agents of fertilizers, with the intention declared of involving them in a multiplicity of suits and prosecutions, unless they shall comply with the law, and that such suits and prosecutions are intended to break up complainants' business, which is a growing and profitable one, and thus destroy their property.

M. J. Cunningham, Atty. Gen., Lionel Adams, and Lazarus, Moore & Luce, for the State.

J. P. Blair, for Lagarde and others.

PARDEE, Circuit Judge (after stating the facts as above). Counsel for respondents present no argument—make no assertion, even—that the act in question (No. 51 of the Laws of 1886) is constitutional; nor, on behalf of respondents, is denial made of the matters presented by the evidence read on the hearing, to the effect that the said law, in its operation, is purely a revenue law, and in no sense an inspection law, and that the bureau of agriculture and their agents are threatening and intending to harass and annoy the complainants with civil and criminal prosecutions under the said act until they shall pay the revenue demanded, or be compelled to abandon their business. The whole showing is addressed to the proposition that under the circumstances of the case the court has no power to grant relief. The title of the act under which the respondents have proceeded against the complainants, and threaten to still further proceed by a multiplicity of suits and prosecutions, is as follows:

"An act to protect and advance agriculture by regulating the sale and purity of commercial fertilizers and the guarantee and conditions upon which they are to be sold, and by fixing the penalties incurred by the violation of such conditions: by providing for practical and other experiments in relation thereto; by reorganizing the board of agriculture, increasing its powers and those of the commissioner of agriculture; by creating an official chemist, defining his duties and powers, and by repealing laws in conflict herewith," etc.

The first section of the act provides for the reorganization of the bureau of agriculture, and defines some of its powers. The second section provides as to the duty of manufacturers and dealers in fertilizers before offering the same for sale; requiring a statement setting forth a description of the brand and package, and the named ingredients which they are willing to guaranty the fertilizer to contain. The third section provides for a certificate of compliance with the second section, to be issued by the bureau of agriculture, and that such certificate shall authorize the manufacture and sale of fertilizers, and further providing, under penalties, that no person who has failed to file the statement shall be authorized to manufacture for sale, or deal in, commercial fertilizers, in the state of Louisiana; the penalty being a fine of $1,000, recoverable before any court of competent jurisdiction. The fourth section provides for circulars setting forth the brands of fertilizers sold in the state, and their claimed analysis, to be distributed by the board. The fifth section provides that the commissioner of agriculture, under regulations, shall prepare tags, of suitable material, with certain marks, which shall be furnished to any dealer or manufacturer who has complied with the second and third sections upon payment of 50 cents for a sufficient number of tags to tag a ton of fertilizer. The sixth section provides that every person, before offering for sale any commercial fertilizers in the state of Louisiana, shall attach, or cause to be attached, to each package, one of the tags aforesaid, and that any person who sells, or offers for sale, any package which has not been tagged, shall be guilty of a misdemeanor, and, besides, liable to a penalty, and further provides a penalty for counterfeiting the aforesaid tags. The seventh section of the act requires that all fertilizers offered for sale in the state of Louisiana shall have printed upon each package, in such manner as the commissioner of agriculture shall determine, an analysis of such fertilizer or chemical. The eighth section authorizes the commissioner of agriculture to obtain fair samples of all fertilizers sold, or offered for sale, in the state of Louisiana; to cause the same to be analyzed, and the analyses published. The ninth section provides for the drawing of samples from any package of fertilizer whenever required by the purchaser. The tenth section provides that the copy of the official chemist's analysis of any fertilizer certified by him shall be admissible as evidence in any court of the state on the trial of any issue involving the merits of such fertilizer. The eleventh section relates entirely to rules and regulations to be adopted by the board of agriculture for the collection of moneys arising from the sale of tags, and from fines imposed by the act. The twelfth section gives authority to the commissioner of agriculture to employ a competent chemist to carry on and conduct experimental stations, etc. The thirteenth section relates to the compensation of the chemist for the conduct of experiments and experimental stations. The fourteenth section provides that the director of the state experiment station shall be considered as the official chemist of the bureau of agriculture. The fifteenth section relates to accounts of tags received

and sold, and moneys collected. The sixteenth section defines the terms "commercial fertilizer or fertilizers," where used in the act. And the seventeenth and last section provides for the act to go into effect at a certain date, and the repeal of conflicting laws.

It is to be noticed that neither in the title nor in any part of the act is the inspection of fertilizers mentioned, or in any wise provided for; the nearest approach to it being in the eighth section, where the commissioner of agriculture is authorized to obtain samples and cause an analysis to be made, and cause publication of the same. Under the terms of the act, a description of the packages of fertilizers, and the statement amounting to a guaranty of the ingredients, must be filed with the commissioner of agriculture, and a certificate of compliance obtained, before any person is authorized to deliver any commercial fertilizers in the state of Louisiana. There is no provision that this statement shall be made, and such certificate obtained, for each and every year or season, or more than once. The complainants aver in their bill that they have complied with this provision of the act. The tags provided for by the act are to be attached to each package before the same shall be offered for sale, from which it follows that the act contemplates only sales of fertilizers within this state, and by persons having possession or custody of the same. Now, as the business of complainants is admitted to be purely and simply that of soliciting agents for a manufactory, and that the only sales they negotiate or make are of fertilizers not within the state, nor in their custody, and that the complainants do not manufacture, pack, ship, handle, or even see, said fertilizers; that they do not now and never have had any fertilizers in their possession in this state, and have never exposed any for sale in this state,—it would seem that the act in question was not intended to, and does not, in any way affect their business, and that they are in no wise liable for any of the penalties provided for in the said act. The bill shows, however, that the law officers of the state have otherwise construed the law; and for that reason it is not requisite that this court should at this time, and for the purposes of this case, so hold or declare. The business of complainants is interstate commerce, and it is beyond the regulation of the state of Louisiana. Nor can the state of Louisiana levy any tax upon it. Robbins v. Taxing Dist., 120 U. S. 492, 7 Sup. Ct. 592; Leloup v. Port of Mobile, 127 U. S. 640–648, 8 Sup. Ct. 1380; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1; Stoutenburgh v. Hennick, 129 U. S. 141–148, 9 Sup. Ct. 256. Even if the act in question could be construed as an inspection law, or as an exercise of the police power of the state, the complainants' business cannot be affected thereby, as complainants do not deal with, nor handle, nor bring to the state, fertilizers; and, even if the complainants were to import into the state original packages of fertilizers, and the act in question could be properly construed as an inspection law, within and under the police power of the state, still the interference with complainants' business would be in violation of clause 3, § 8, art. 1, of the constitution of the United States. Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681; In re Sanders, 52 Fed. 802.

The case, then, is one within the jurisdiction of this court, and warrants relief according to equity principles and practice. An injunction is the usual relief in such cases, and it is asked for in this case. The respondents say that it cannot be issued, because the suit is one against the state, and the state cannot be enjoined, nor can it be issued against the law officers of the state, to restrain them from instituting criminal proceedings under the said law, nor can it issue against state officers or state boards, because such an injunction would be equivalent to an injunction against the state. The state of Louisiana was a party to the suit under which complainants' bill, as a cross bill, was originally filed; and when, by consent of parties and an order of court, the cross bill was permitted to stand as an original bill, the state of Louisiana was not dismissed, but remained as, practically, a nominal party. The objection that the suit is one against the state, so far as it has merit, can be eliminated from the case by the formal dismissal of the bill as to the state of Louisiana. The board or bureau of agriculture, or any of the individual members thereof, and some other persons who cannot be classed as agents, attorneys, or employes of said board, against whom complainants desire relief, should be made parties. Leave will be given to the complainants to amend their bill in these respects.

The state being out of the case, there is only one serious question as to the scope of the injunction that ought to be issued, and that is whether a court of equity can enjoin the law officers of the state from instituting and prosecuting criminal suits or proceedings under a void or unconstitutional law. Many cases on each side of this question have been cited and examined, but I do not think it necessary to review them at this time, for the purposes of this case, nor to determine the yet unsettled question of how far proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity. In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482; Lottery Co. v. Fitzpatrick, 3 Woods, 222; Bottling Co. v. Welch, 42 Fed. 561; Texas Railroad Commission Case, 51 Fed. 529. There is only one section of the act in question that in any way calls for or requires the district attorneys of the state, as such, to institute criminal proceedings against the complainants, even if complainants' business should be construed as being within the act; and that section relates to cases where complainants shall be charged with selling, or offering to sell, any package of commercial fertilizer which has not been tagged as provided in the act. It is not at all probable that the district attorneys of the state will constitute themselves inspectors of fertilizers, or agents of the board of agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for noncompliance with the act in question, will be instigated, instituted, and prosecuted only through the action of the board of agriculture, its members, officers, agents, and attorneys. There can be no doubt about the power of the court to issue an injunction running to those

persons, restraining their action as prayed for in the bill; and, on complainants amending their bill as herein suggested, such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.

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## MILLSAPS v. CITY OF TERRELL.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1894.)

No. 190.

1. MUNICIPAL CORPORATIONS—BONDS—LIMIT OF INDEBTEDNESS.
Const. Tex. art. 11, §§ 5, 7, provide that no city shall ever incur a debt for any purpose or in any manner, unless at the same time provision is made for levying and collecting a tax sufficient to pay the interest, and a sinking fund of at least 2 per cent. per annum. Article 8, § 9, provides that the tax to be levied for the erection of public buildings and other permanent improvements shall not exceed 25 cents of the $100 valuation in any one year. *Held*, that the power of a city to create debts for such purposes is limited to a sum upon which the interest, together with 2 per cent. for the sinking fund, will not exceed the revenue derived from a tax of 25 cents on the $100.

2. SAME.
After a city had issued bonds to such an amount that the interest and sinking fund absorbed the whole of such tax, it issued another series, and provided that the interest and sinking fund should be appropriated out of the general revenue of the city. *Held*, that the first issue of bonds, to the full amount authorized by the constitution, exhausted its power to contract debts, and the additional issue is void, without regard to its authority to apply its general revenue to the payment of interest and sinking fund of a bonded debt.

In Error to the Circuit Court of the United States for the Northern District of Texas.

At Law. This was an action by Reuben W. Millsaps against the city of Terrell. There was judgment for defendant, and plaintiff brings error.

The defendant, the city of Terrell, is a municipal corporation in the state of Texas, existing under and by virtue of chapters 1 to 10 of title 17 of the Revised Statutes. In the month of July, 1884, defendant created a debt for waterworks purposes by issuing bonds to the amount of $28,000, bearing interest at the rate of 7 per cent. per annum. In the month of October of the same year, for the purpose of erecting a city hall, defendant issued other bonds to the amount of $25,000, bearing interest at the rate of 8 per cent. per annum; and on the 1st day of January, 1885, for the purpose of completing this building, defendant made yet another issue to the amount of $2,000, bearing interest at the rate of 8 per cent. per annum. The taxable values of all the real and personal property in the city for the year 1884, as shown by the assessment rolls for that year, were $908,976. At the time of issuing the waterworks bonds, the city, by ordinance, provided for the levy of an annual tax of one-fourth of 1 per cent. to pay the interest and create a sinking fund for said bonds. Plaintiff's bonds of the first ($25,000) series were issued under an ordinance passed September 23, 1884, the third section of which is as follows: "Sec. 3. For the purpose of meeting the interest upon said bonds, and providing an annual sinking fund sufficient to discharge the principal at maturity, an annual ad valorem tax of twenty-five cents on the $100 on all property, real and personal, in said city subject to taxation, is hereby levied, and there shall be, and is hereby set apart out of the general revenue of the city constituted by one-fourth of one per cent. ad