

This was a petition of intervention filed by Smith Bennett in the case of the Baltimore Trust & Guaranty Company against the Atlanta Traction Company to recover from the receiver of the latter company damages for personal injuries sustained while in the receiver's employment.

Marshall J. Clark and T. J. Ripley, for intervener.  
Rosser & Carter and King & Anderson, for defendant.

NEWMAN, District Judge. The question in this case is as to the liability of a receiver of a court operating a railroad to an employé injured by the negligence of a coemployé. I must determine, as I have heretofore done, that there is no such liability. It is unnecessary that the reasons should be given again, as they have been fully set forth in the opinions of the court in the cases of Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co., 69 Fed. 353, 357.

It is further insisted that the question of fellow service is not in this case. The injury was to the conductor of one electric car, who was injured, as is assumed in the argument, by the negligence of a conductor of an opposing electric car, he being responsible for a collision which occurred and which was the accident causing the injury. The question is raised as to whether the two conductors are fellow servants, as applicable to the question of employer's liability. My opinion is that they are. I think they are such under the general law and under the decisions of the supreme court of the United States. Any other conclusion cannot be reached from the later decisions of the supreme court. Much more clearly would they be fellow servants in the case of conductors on the same line of street and suburban cars of a city than on a long line of steam railroads running from city to city. The intimacy of their relations is greater, and they come more closely in contact, in the one case than in the other, and the fact of fellow service for the purpose of applying it to the case at bar is more apparent.

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SOUTHERN RY. CO. v. CITY OF ASHEVILLE.

(Circuit Court, W. D. North Carolina. August 24, 1895.)

**1. INJUNCTION—JURISDICTION—RESTRAINING LEVY OF TAX.**

Injunction will lie to restrain the levy of a tax, where the complainant is a common carrier, and the tax is made a lien on its real estate, though its personal property is first to be resorted to by the tax collector, and the remedy at law, by payment and action to recover back, is not as efficient as the remedy by injunction.

**2. INTERSTATE COMMERCE—RAILROAD COMPANIES—LICENSE TAX.**

Act N. C. March 13, 1895, § 42, subd. 6, authorizing a city to levy, on every railroad company doing business or having an office in the city, a license tax, not to exceed 1 per cent. of the gross receipts of its business, is invalid, in the case of a railroad whose business extends to points out of the state, as a regulation of interstate commerce, and therefore a tax levied under it is invalid, though it is limited to business of the railroad done within the state.

Bill by the Southern Railway Company against the city of Asheville to enjoin levy of a license tax. Decree for complainant.

Fab. H. Busbee, for petitioner.  
Julius C. Martin, for defendant.

**SIMONTON**, Circuit Judge. This is a bill filed by the complainant, a citizen of the state of Virginia, and engaged in the business of a common carrier, against the defendant, a municipal corporation of the state of North Carolina, praying an injunction against the levy of a tax because it violates the interstate commerce law. Upon filing the bill, a rule to show cause was issued with the usual restraining order. The respondents filed their answer, and the case has now come up, using the answer as a return to the rule. The answer is a strong presentation of the position of the defendant. It challenges the jurisdiction of the court on every ground of equitable cognizance, and on the merits insists that there is no violation of the interstate commerce law,—the ground set up by complainant as the foundation of the prayer for an injunction. The complainant, a railroad company doing business in and having an office in the city of Asheville, has been required to pay to said city a privilege tax, being the amount of 1 per cent. of the gross receipts on its said business in that city. The business upon which this is estimated the city council limited to the business done within the state of North Carolina.

The first question to be met in this case is as to the jurisdiction of the court. An injunction will not lie against an illegal tax on the sole ground that the tax is illegal. *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Allen v. Car Co.*, 139 U. S. 658, 11 Sup. Ct. 682. The circumstances must bring the case within some recognized branch of equitable jurisdiction, such as where the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, in case of real estate, would throw a cloud upon the title. *Robinson v. Wilmington*, 25 U. S. App. 147, 13 C. C. A. 177, 65 Fed. 856. Under the charter of the city of Asheville the fiscal year begins on the 1st of June. The lien of the tax attaches to all real property of the taxpayer from that date, and is paramount to all other liens, and continues until the tax is paid. It is true that, in the collection of the tax, the tax collector must first seek personal property out of which the tax may be paid. But that lien on the realty exists and continues and is finally put in active operation if there be an insufficiency of the personalty. The tax therefore from the 1st of June creates a cloud on the title of all the realty of the taxpayer. Again, a railroad company is a common carrier. Its plant consists of rolling stock of every description, designed for use in performing its functions as a carrier. The real estate is subsidiary to the use of the plant. The existence of a tax execution under which any part of this rolling stock can be levied on and stopped, its business and traffic interrupted, at the hazard of grave responsibility to the public, involves a threat of irreparable injury, and an exposure to a multitude of suits. *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962. It is said that the statutes of North Carolina give to the complainant a plain, adequate, and complete remedy at law. Apart from the question whether this court, sitting in

equity, can be deprived of jurisdiction because a remedy exists in some other tribunal in another jurisdiction, it does not seem that the remedy tendered by this statute is plain, adequate, and complete. Equity jurisdiction may be invoked though there be a remedy at law, unless the remedy at law, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy in equity. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. The remedy under the statute requires the payment of the disputed amount in full, a suit against the official receiving it, a trial in a state court, with the uncertainty both as to the recovery and the mode of enforcing it, as well as of the person against whom it may be enforced. It can hardly be said that this remedy is either plain, adequate, or complete. This seems to be conceded under the statute of North Carolina, for section 76, c. 119, Laws 1895, permits an injunction to lie if the tax is levied for an illegal or unauthorized purpose, or be illegal or invalid. The issue in this case is, is this tax illegal or invalid?

This brings us to the merits of the case. The tax in question is levied by the city of Asheville under the authority of the legislature. As municipal corporations in themselves have no authority to levy taxes, and derive all their authority to this end from the legislature, we must look to the act of the legislature, and determine whether or not that is in conflict with the constitution and laws of the United States. If the action of the legislature be invalid, nothing that the municipality can do under it can cure the invalidity or restore it to life. Were this not so, the municipality, the creature of the legislature, could amend and control the act of its creator. The act of the legislature of North Carolina giving the charter powers to the city of Asheville authorizes the city to levy on "every express company, telegraph company, telephone company, gas company, electric light company, power company, street-railroad company and railroad company, doing business or having an office in said city, a license tax." Act March 13, 1895, § 42, subd. 6. This is a tax on the business or calling of the several classes mentioned, and is imposed because of that business. The amount of the tax is limited. It must not exceed in amount 1 per cent. of the gross receipts of the business during the year. Now the business of the complainant corporation is that of common carrier between Asheville and points within and without the state of North Carolina; that is to say, of interstate and intrastate commerce. And this act taxes all this business. The complainant is taxed, not because some of its business is between points within the state of North Carolina, but because it does business and has an office in Asheville. Its business may be wholly interstate, yet, under the terms of this act, it must pay the license tax. It is true that, in estimating its license tax, the city council only took into consideration the intrastate business of the company. But under the terms of the act they could have made the estimate upon the whole business of the company, and we deal not with what the council did do, but with what they could have done, under the authority conferred on them. The validity of this authority, not of their action under it, is the question before us. This case is on

all fours with the case of *Webster v. Bell*, 68 Fed. 183, decided by the circuit court of appeals, Fourth circuit, at its May term. Let the temporary injunction issue, as prayed for in the bill.

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THE NEW MARY HOUSTON.

KINEON v. THE NEW MARY HOUSTON et al.

(District Court, S. D. Ohio, W. D. July 10, 1895.)

No. 1,723.

1. ADMIRALTY PLEADING—EVIDENCE—VARIANCE.

Proof, in a collision case, that the cables of a river steamboat which went adrift were not bent to her anchors, *held* proper to be considered, although the fact was not averred in the libel; it appearing that there was no surprise, and that the attention of counsel had in fact been called to the variance before the hearing.

2. COLLISION—DRIFTING STEAMER—NEGLIGENCE.

That the cables of a river steamboat moored to a wharf, which broke loose, went adrift, and collided with coal barges, were not bent to her anchors, *held* no proof of negligence.

3. SAME—DRIFTING STEAMER AND WHARF—NEGLIGENT MOORING.

Where a wharf and river steamboat moored thereto went adrift, and collided with coal barges, *held*, that the question of the steamer's liability was one of negligence in respect to the fastenings, and that such negligence would consist in a failure to adopt all precautions suggested by skill, experience, and careful, prudent, and intelligent forethought.

4. SAME—NEGLIGENCE OF MASTER.

Where a river steamboat went adrift on a dark night at a place where there was great danger of striking bridge piers, *held*, that it was not negligence or bad seamanship for the captain, before going on deck, to first see to extinguishing lamps and stoves, for the purpose of preventing the breaking out of fires in case of collision.

This was a libel in rem, by Sol P. Kineon against the steamboat *New Mary Houston* to recover damages resulting from a collision.

William Worthington, for libellant.

Stephens, Lincoln & Smith, for respondents.

SAGE, District Judge. This is a libel for damages by collision which occurred about 2 o'clock in the morning of Saturday, January 16, 1892, on the Ohio river, at Cincinnati. The *New Mary Houston* was plying regularly between Cincinnati and New Orleans. She came up the river on the evening of Thursday, January 14th, and moored at the wharfboat of the Southern Wharfboat Company, her usual landing place at the Cincinnati public wharf between Broadway and Sycamore streets. After she was fastened to the wharfboat the fires were extinguished, the "wrist" from the "doctor" (an essential part of her operating machinery when in motion) was taken out for repairs, and she began to discharge her inbound cargo and to receive her outbound cargo. About 2 o'clock on Saturday morning the wharfboat broke loose from its moorings, and, together with the steamboat, drifted down stream. At the foot of Elm street, about half a mile below where the wharfboat was moored, a collision occurred with the coal fleet of the Pittsburgh Coal Com-