CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

HOLT et al. v. INDIANA MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 354.

CIRCUIT COURTS OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

A suit between citizens of the same state to enjoin the collection of a state tax on the value of patent rights, on the ground that the state statute authorizing the tax contravenes the federal constitution, is not a suit arising under the patent laws so as to give jurisdiction to the circuit court of appeals, but is one involving the validity of a state statute under the constitution of the United States, and must, therefore, be taken direct from the circuit court to the supreme court, under section 5 of the act of March 8, 1891.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Indiana Manufacturing Company, the appellee, a corporation organized and existing under the laws of the state of Indiana, brought suit in the court below against the appellants, who were, respectively, Sterling R. Holt, the treasurer, Joel A. Baker, the assessor, Thomas Taggart, the auditor, and George Wolf, the assessor, of Center township, of Marion county, and who, with the other appellants, constituted the board of review of Marion county, and who are, respectively, citizens of the state of Indiana, to enjoin the collection of certain personal taxes for the years 1892, 1893, 1894, and 1895, assessed upon the capital stock and certain tangible property of the Indiana Manufacturing Company. The gravamen of the charge in the bill is that the larger part of the assessment made by the taxing authorities was for the supposed value of certain rights under letters patent of the United States owned by the appellee, and which it is claimed are not subject to assessment or taxation by state authority; and that its capital stock, aside from its tangible property which was conceded to be assessable, represented solely the supposed value of the letters patent. So far as the assessment included tangible property owned by the appellee, the taxes levied thereon had been paid. Jurisdiction is asserted, notwithstanding there existed no diversity of citizenship, upon the grounds that the suit is brought to redress the deprivation, under color of the laws of the state of Indiana, of a right secured by the constitution and laws of the United States, and that the statutes of the state of Indiana requiring the taxation of patent rights or letters patent of the United States are repugnant to the constitution of the United States, and are void; and upon the further ground that the suit is one arising under the patent laws of the United States. A general demurrer for want of equity was overruled,

and the defendants thereupon pleaded to the merits. The court below decreed for the complainant (the appellee here), holding that the material allegations of the bill were established by the proofs; that the taxes assessed upon the valuation of the company's capital stock were an indirect assessment for taxation of the letters patent owned by the complainant; that the statutes of the state of Indiana relating to and requiring the taxation of patent rights or letters patent of the United States are unconstitutional, invalid, and void; that the cloud placed upon the title of the corporate property of the company by reason of such assessment and taxation should be removed; and that the defendants (appellants) and their successors in office should be and they were perpetually enjoined from the collection of such taxes, "or any other amount [of taxes] which may be claimed to be due on account of the value of any patent rights or letters patent owned or held by complainants, directly or indirectly, or on account of the value of the stock of complainant by which such patent rights or letters patent may be represented." The appeal is from that decree.

William A. Ketcham and Alfred R. Hovey, for appellants.
Chester Bradford, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after such statement of the case, delivered the opinion of the court.

At the threshold we are confronted with an objection to the jurisdiction of this tribunal to entertain the appeal which seems insuperable. There is no question involving the jurisdiction of the court below. That jurisdiction rested upon the ground that the suit was instituted to uphold a right secured by the constitution and laws of the United States, of which the complainant below was sought to be deprived under color of the laws of the state of Indiana, and the decision below held those laws to be unconstitutional and void. The fifth and sixth sections of the act of March 3, 1891, whereby this court was established, and its jurisdiction defined (26 Stat. 826, c. 517), classify the cases which may be taken by appeal or writ of error from the circuit or district courts to the supreme court of the United States, and those which may be taken to this court. The fifth section provides that appeals or writs of error in the following cases may be taken directly to the supreme court of the United States: (1) In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision. (2) From the final sentences and decrees in prize causes. (3) In case of a conviction of a capital or otherwise infamous crime. (4) In any case that involves the construction or application of the constitution of the United States. (5) In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. (6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. Section 6 provides that the appellate jurisdiction of this court shall be exercised to review by appeal or by writ of error the final decisions in the district courts and the existing circuit courts in all cases other than those provided for in section 5, unless otherwise provided by law. This section also enumerates the cases in which the judgment or decrees of this court shall

be final, recognizing its right to certify to the supreme court any question or proposition of law within the appellate jurisdiction of this court concerning which it desires the instruction of that court for its proper decision.

While it is true that the bill asserts jurisdiction in the court below in part upon the ground that it is a suit arising under the patent laws of the United States, it cannot be said that in any just sense this is a case arising under the patent laws of the United States, so as to confer jurisdiction by appeal upon this court, and in respect to which its decision would be final. It is true that the wrong complained of had for its subject-matter the taxation of rights secured by letters patent issued by the United States under its patent laws. It is not correct, however, to say that, therefore, a suit to prevent such taxation arises under the patent laws of the United States. Brown v. Shannon, 20 How. 55; Hartell v. Tilghman, 99 U. S. 547; Albright v. Teas, 106 U. S. 613, 1 Sup. Ct. 550; Manufacturing Co. v. Hyatt, 125 U. S. 46, 8 Sup. Ct. 756; U. S. v. Palmer, 128 U. S. 262, 269, 9 Sup. Ct. 104; Marsh v. Nichols, 140 U. S. 344, 11 Sup. Ct. 798; Wade v. Lawder (decided March 1, 1897) 17 Sup. Ct. 425.

The question at issue is whether the statutes of the state of Indiana authorizing such taxation are repugnant to the constitution of the United States. That is not a question arising under the patent laws of the United States. The jurisdiction of the court below, there being no diversity of citizenship of the parties, rested and could rest only upon the ground that the constitutional rights of the complainant below were infringed by the laws of the state of Indiana which were repugnant to and in contravention of the constitution of the United States. The statute provides that in such cases appeals or writs of error may be taken directly to the supreme court. The case falls within the classification of cases in section 5 over which this court has no jurisdiction upon appeal. It is urged that we should entertain the jurisdiction and certify the question of the validity of the laws of Indiana to the supreme court. That we cannot do. If we have jurisdiction, we may decide the question without certifying it to the supreme court. If we have not jurisdiction, we cannot acquire it by, or assume it for the purpose of, the discretionary act of certification. The decisions in McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118; Maynard v. Hecht, 151 U. S. 324, 14 Sup. Ct. 353; U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39; In re New York & P. R. S. S. Co., 155 U. S. 523, 531, 15 Sup. Ct. 183; In re Lehigh Min. & Manuf'g Co., 156 U. S. 322, 326, 15 Sup. Ct. 375; Shields v. Coleman, 157 U. S. 168, 176, 15 Sup. Ct. 570; Colvin v. City of Jacksonville, 157 U. S. 368, 15 Sup. Ct. 634, —in which it was held that in cases where the jurisdiction of the lower court is involved, the party "must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court,"—have reference only to cases involving the jurisdiction of the court below, which are comprehended within the first subdivision of the fifth section of the act. They have no application to the other subdivisions of the

section, which classify the cases in which the supreme court has jurisdiction upon appeal or writ of error. In those cases its jurisdiction is exclusive. Horner v. U. S., 143 U. S. 570, 576, 12 Sup. Ct. 522; Carey v. Railway Co., 150 U. S. 170, 181, 14 Sup. Ct. 63; Chappell v. U. S., 160 U. S. 499, 509, 16 Sup. Ct. 397; Scott v. Donald (Jan. 18, 1897) 165 U. S. 58, 17 Sup. Ct. 265. The circuit courts of appeals have jurisdiction only in cases other than those provided for in section 5. This case is therefore one in which the jurisdiction of the court below and the right to relief depended upon the question whether the laws of the state of Indiana which sanctioned the taxation in question were in contravention of the constitution of the United States, and therefore a case arising under the constitution or laws of the United States. It was so considered by the court below, and relief was granted solely upon that ground. We are constrained to the conclusion that this court has no jurisdiction of an appeal from that decree, and that the proper and only remedy of the appellants is by appeal to the supreme court of the United States. Appeal dismissed.

TURNBULL WAGON CO. v. LINTHICUM CARRIAGE CO. et al.

(Circuit Court, N. D. Ohio, W. D. February 20, 1897.)

1. REMOVAL OF CAUSE—SEPARABLE ACTION.
   A bill by a creditor to enjoin an execution sale of the insolvent debtor's property, set aside the levies, and subject the property to the claims of all the creditors pro rata, is not a separable action within the removal acts.
2. SAME—LOCAL PREJUDICE.
   Local prejudice justifying the removal of a suit to enjoin an execution sale of the property of an insolvent company, and subject it to the claims of all the creditors, is not shown by an affidavit alleging that the newspapers of the county have denounced the company for alleged fraudulent dealings with its property; that the common pleas judge, on hearing a motion for the appointment of a receiver, stated that he "would see" that defendants did not take the property out of the county; and that the opposing lawyers referred to them in abusive terms.

Some time in the fall of 1896, Story & Bunnell, of Baltimore, Md., had judgments entered on certain cognovit notes against the Linthicum Carriage Company, of Defiance, Ohio, in the court of common pleas of Marion county, Ohio, and on these judgments levies were made on the property of the corporation at Defiance. Subsequent judgments were taken in favor of the First National Bank of Defiance and other parties, and levies followed. The property of the carriage company was advertised for sale under these levies, pending which the Turnbull Wagon Company, of Defiance, instituted suit in the court of common pleas of Defiance county against the execution creditors and the sheriff of said county on behalf of itself and all other creditors who (under the statute of Ohio) might come in and join in the prosecution of the suit, to enjoin the sale of the property, set the levies aside, and subject the property of the insolvent carriage company to satisfy the claims of the creditors pro rata. It was also sought by the plaintiff to subject certain unpaid subscriptions of Story & Bunnell, and possibly their stock liability