It will be seen from this section that the law provides for the assessing of shares of stock to the owners, and to this end the cashier or other accounting officer of a bank must furnish a verified statement showing the amount and number of shares of the capital stock, and the surplus or reserve fund. It is not required that such officer should state the names of the shareholders. The statement is required to enable the assessor to fix the value of the shares of each stockholder. There is nothing in any of the affidavits to show that any such statement as is provided in said section 3691 was demanded of any officer of the bank. If the statement given of the amount of capital, the undivided profits, and surplus was intended to comply with this provision of the statute, this did not authorize the said assessor to list the shares of stock to the bank. Neither a national bank nor the stock therein can be taxed by a state law unless the United States expressly authorizes the same, and then only to the extent of such authorization. Mercantile Bank v. City of New York, 121 U. S. 138, 154, 7 Sup. Ct. 826. I am unable to see how the term "capital," as returned by Hill, the assistant cashier, can be construed to mean shares of stock. There is a clear and well-understood distinction between the terms "capital" and "shares of stock." When the assessor made his computation, he found $497,906 of stock. If this meant the value of the stock, we do not have the number of such shares, or by whom held. Unless the bank owned the shares of stock, the assessor had no right to assess the same to the bank. The law, both state and national, provides that the shares of stock shall be assessed, and to the owners thereof. The bill avers that there were various individual stockholders of the said bank, holding various numbers of shares of said capital stock in separate and distinct ownership. It cannot be assumed that the bank owned all the shares of its capital stock. There is no list of the bank showing this. I do not think the return that the bank made can be construed to be a return of the shares of the capital stock. It has been held that the capital of a bank is not subject to state taxation. If the bank gave in its capital for taxation, it is not estopped now from refusing to pay the same. It would be the same as listing property exempt from taxation, and there is no reason of justice or public policy which would preclude the bank from refusing to pay the same. Cooley, Tax'n, 263, 264; Dunnell Manuf'g Co. v. Inhabitants of Pawtucket, 7 Gray, 277; City of Charlestown v. Middlesex Co. Com'rs, 109 Mass. 270. If the assessor made out the list, and assessed the capital or shares of stock to the bank, he had no right to do either. He should have known that the bank was not liable to pay taxes on the shares of its stock in solido; that that tax was due from the holders of such shares; and, as for the capital, that was not permitted to be taxed. National Bank v. City of Richmond, 42 Fed. 877.

The next question presented is as to whether the court has any right to enjoin the collection of this tax. It is claimed on behalf of the defendant that the receiver, Brown, should pay this tax under protest, and then recover the same back from the tax

collector in an action at law. The tax in this case was made by law a lien upon the real estate of the bank, although not a tax on such real estate. The tax collector was proceeding, under the provision of the state law, to sell the real estate described, and had advertised the same for sale. Such a sale as this would have created a cloud upon the title of the bank to the real estate sought to be sold. The deed given in pursuance of such a sale would be prima facie evidence that (1) the property was lawfully assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Pol. Code Mont. § 3897. In the case of Huntington v. Railroad Co., 2 Sawy. 503, 514, Fed. Cas. No. 6,911, Judge Sawyer held that a deed in such a case would cast a cloud upon the title to the land named therein, and said:

"In such case the court will interfere by injunction to prevent a cloud being cast upon the title. The court will enjoin the casting of a cloud upon the title in cases wherein the cloud itself, when cast, would be removed." Pom. Eq. Jur. § 1345.

In the case of Railway Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601, 605, Justice Bradley, speaking for the court, said:

"Even the cloud cast upon his title by a tax under which such a sale would be made would be a grievance which would entitle him to go into a court of equity for relief."

In the following cases it is recognized that a court of equity will interfere to restrain the collection of an illegal tax when some established ground for equitable interference is presented: Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Dows v. City of Chicago, 11 Wall. 109; Hannewinkle v. Georgetown, 15 Wall. 547; Lyon v. Alley, 130 U. S. 177, 9 Sup. Ct. 480. Cooley, Tax'n, 422–444. If the preventing or removing a cloud upon a title is a recognized ground of equity jurisdiction, a law of a state which affords a legal remedy for the wrong complained of will not devest the court of equity of its jurisdiction in a proper case. In the case of Barber v. Barber, 21 How. 582, 592, the supreme court said:

"It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the federal courts is the same in all the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunal."

See, also, Kirby v. Railroad Co., 120 U. S. 130, 137, 7 Sup. Ct. 430.

There is another consideration presented in this case. The complainant is a receiver, and hence occupies a fiduciary relation to the creditors of said bank. In the case of Cummings v. Bank, 101 U. S. 157, the supreme court said (in a case where a bank held a fiduciary relation to its shareholders), "It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it." In City of Boston v. Beal, 51 Fed. 306, it was held that a receiver of an insolvent bank could not be required to pay the taxes on the shares of stock of the stockholders, although the law requiring the bank, if solvent, to do this, would be good.

For these reasons, I hold that an injunction pending this action should issue, upon the complainant executing a bond to save defendants harmless on account of the issuing thereof, in the sum of $5,000.

KING v. WILLIAMSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 183.

INJUNCTIONS PENDING EJECTMENT.

An injunction obtained by a plaintiff in ejectment to preserve the status quo pendente lite is properly dissolved, and the bill dismissed, when it appears that judgment has been rendered for the defendant in ejectment.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Maynard F. Stiles, for appellant.
Campbell & Holt, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by appeal from the circuit court of the United States for the district of West Virginia. Henry C. King claims to be the owner in fee simple of a tract of land containing about 500,000 acres, granted to Robert Morris on the 23d of June, 1795, lying in the states of Virginia, West Virginia, and Kentucky. In order to recover possession of a part of this tract which lies in West Virginia, he instituted actions of ejectment in the circuit court of the United States for the district of West Virginia against a large number of persons, among whom are the appellees here. Very soon thereafter, and as ancillary to said actions of ejectment, he filed his bill on the equity side of the court against these appellees, praying an injunction against them from using the said land pendente lite. On the 4th of December, 1894, an order was issued on this bill against the said defendants, requiring them on a day certain to show cause why an injunction should not issue as prayed for in the bill, and in the meantime the usual restraining order was granted. On the 28th of February, 1896, the restraining order being still in force, but no formal order of injunction having been granted, the defendants filed their plea to the bill. In this plea they aver "that in the action of ejectment of the said Henry C. King against M. B. Mullins, Alexander McClintock, and John McClintock, wherein the said Henry C. King sought to recover possession of and an estate in fee in the same tract of 500,000 acres of land mentioned and described in the bill, upon a trial thereof before this honorable court and a jury impaneled therein, it was, to wit, on the 27th of February, 1896, by the judgment and consideration of this honorable court, adjudged that the said Henry C. King had no right to recover the possession of the said land, or any part thereof, and that he had no title in fee or otherwise thereto, or to any part thereof; which judgment still remains in full force and