assessment filed by Norman would indicate that there was no assessment for taxes for the years 1839 to 1846, and the certificate of John Hargis recites that the land had been forfeited for the nonpayment of taxes for the year 1839. The act approved December 7, 1822, provided that it should be the duty of the auditor, when three years' taxes and interest became due on lands, to advertise the same for three successive months previously to the 1st of November in the newspapers of the public printer twice each month, stating the amount of taxes, interest, and costs due on each tract; and, if the same be unpaid on any tract or tracts as aforesaid, the same shall be stricken off to the commonwealth, and all the right, title, and interest of such nonresident shall thereby invest in the commonwealth; nevertheless, said land may be redeemed as provided for in the act of December 5, 1820. If this be considered as forfeiting the rights of John Wilson to the state of Kentucky for taxes for the years 1836 to 1838, there is no evidence in the record to show that that which is required by the act of 1822 was ever complied with. Hence there is no evidence to show that the interest of Wilson, if he had any, in the land patented to Thomas Franklin, was assessed for 1839 to 1845, or that it was stricken off to the state under the provisions of the act of 1822, after proper notice. But considering the proceeding by John Hargis, agent, as under the act of 1840, as amended by the act approved March 10, 1843, the record is likewise fatally defective in showing that any title passed by such alleged sale. The act of 1840, as amended by the act of March 10, 1843, authorized the selling of property which had been stricken off to the commonwealth, but provided that the auditor may authorize his agent to sell the same to the former owner, or his heirs or assigns, for the taxes due thereon, with the interest and charges, with 10 per cent. thereon; and further, when no former owner or heirs or assigns could be found to redeem, and there was then any one in possession of such land, or any part thereof, under adverse title, such person in adverse possession shall have the right to quiet his title by paying the amount of the taxes, interest, and charges, with 10 per cent. thereon; and section 3 of the amended act provides "that when there shall be no former owner or his heirs or assigns willing to redeem, and no one in adverse possession willing to purchase, the auditor may direct the agent or attorney to sell the land, in one or more tracts, to suit purchasers for as much as it will bring at public sale, provided it shall not be sold for less money than the amount due the commonwealth, with interest and charges." Thus, the right of the auditor to direct a sale is dependent on the effort to find the original owner, or the heirs or assigns, and allow him or them to redeem, or to give the occupant in adverse possession the opportunity to quiet his title, and his refusal to avail himself of it; and then the law provides for the advertising of the sale and the place of sale, which seems to have been done, but there is no evidence here that any effort was made either to find John Wilson or his heirs, or to inquire whether there was any one in the adverse possession of said land, or any part thereof. This record shows that ir

this large territory, which was thus sought to be sold, there were a great number of persons who were in the actual possession of part of it, and that they claimed adversely to Wilson's title.

The court of appeals had occasion to construe the act of 1840 before the amendment of 1843, but when it was as to tax sales substantially as after the amendment, in the case of Bishop v. Lovan, 4 B. Mon. 116. In that decision it declared that it was necessary to be shown that the former owner or heirs were sought to be found before the property could be sold for taxes, and in that case the court say:

"If the agent's right to sell to a third person is not dependent upon the prior positive refusal of the former owner, his heirs or assigns, and also of the occupant, upon due and proper notice, it was at least certainly the duty of the agent to have made diligent search and inquiry for them, and each of them, before he sold; and upon such diligent search and inquiry had failed to find either, and only upon such facts being made to appear could his sale be sustained, if ever it could be sustained upon such proof, which we are not now prepared to concede. The agent is a private individual, and is not a public officer. He executes no bond for the faithful discharge of his duties or the indemnification of those who may be injured by his failure to do his duty, nor is he required to take an oath, nor does he act under the sanction of an official oath. No presumption will be indulged in, therefore, in favor of the regularity of his acts, but the person claiming title under his sale must show that he has done everything which the law requires to be done to authorize the sale; and, as that was not shown in this case, the instruction of the court was proper, and the judgment is affirmed." Page 120.

The case at bar is entirely bare of any evidence showing any effort to find Wilson or his heirs, if dead, or to make an offer of redemption to any person who might be in actual and adverse possession of any part of this land. It is true that the record shows that the proper public notice was given by publication in the newspaper, and that the sale actually took place, and that William Strong was present at the time of the sale; but there is no evidence at all of any effort to find either John Wilson, or his heirs at law, or to make any offers to the several occupants within this patent of Thomas Franklin. This was an immense body of land, as the record shows, being perhaps one-third of the county of Breathitt, having on it, perhaps, that proportion of the inhabitants of the county. Nor is there any direct evidence of the appointment of John Hargis as agent of the auditor previous to the sale in September, 1846. There is no direct or exact evidence as to the contents of the deed which he subsequently executed to J. W. South and Daniel Breck. We therefore do not know what recitals, if any, there were in that deed. The proceeding in the Breathitt circuit court, at the instance of J. W. South's heirs, to substitute a new deed for the deed which had been executed by John Hargis, does not at all change or strengthen the complainant's position. The title to this land was not then in Fayette Hewitt, then the auditor of the state, even assuming that the land had been forfeited. But this land could not have been constitutionally forfeited to Kentucky without office found, under the act of 1825, as was decided by the court of appeals of Kentucky in Marshall v. McDaniel, 12 Bush, 381.

If I am correct in the conclusion that no title passed by these tax

sales, either the sale of 1811 or that of 1848, then the only remaining question is whether or not the complainant has acquired title by adverse possession. The legal effect of the sale by John Hargis in 1846, although it passed no title, may be considered as giving color of title to the entry of J. W. South and Daniel Breck, if they took actual possession of the land in controversy, and held the same continuously, notoriously, and adversely. This record upon the subject of possession both by the complainant and the Souths, and also by the defendant, is very voluminous; but, after a careful reading of the testimony, I am perfectly satisfied that neither the complainant, J. W. South, nor his heirs, have ever had actual possession of the land in controversy, which was continuous, notorious, and adverse for 15 years. There is evidence to show a claim of title by J. W. South and Daniel Breck, and by their heirs and assigns, of lands within the Thomas Franklin patent, and that they conveyed several tracts of land within said patent. These conveyances, however, were generally to occupants of the land claiming adversely. There is also evidence that shows that J. W. South individually in his lifetime, and his heirs since his death, held the actual possession of two tracts of land with marked boundaries, that are near, if they are not adjoining, the land in controversy. But these tracts were not entered by South under his alleged purchase at tax sales in 1846, nor were they held under said sale by South for himself and Breck or Breck's vendees. There is no evidence of an actual possession of the land in controversy by South and Breck and those claiming under them for any continuous time, although there is evidence showing an occasional mining of coal; said mining not continuing from season to season, but once or twice in a series of years, and also of an occasional cutting of timber on the land in controversy. But there is certainly not sufficient evidence to prove an actual, continuous, notorious, and adverse possession for 15 years, or, indeed, for any number of years; and, as the complainant has not the legal title, it must follow that his bill cannot be sustained.

This view makes it unnecessary to consider either the title of the defendants or their claim to title arising from adverse possession, as the relief, if granted at all, must be upon the strength of complainant's own title. It follows from this view that the complainant's bill should be dismissed, with costs; and it is so ordered.

CENTRAL TRUST CO. OF NEW YORK v. CITIZENS' ST. R. CO. et al.

(Circuit Court, D. Indiana. April 23, 1897.)

1. CONSTITUTIONAL LAW — SPECIAL AND LOCAL LEGISLATION — CLASSIFICATION OF CITIES.

The constitution of Indiana provides (article 4, § 23) that in certain enumerated cases, and "in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state"; and also (article 11, § 13) that "corporations other than banking shall not be created by special act, but may be formed under general laws." In 1897 the legislature of Indiana passed an act to amend

its general law for the incorporation of street-railroad companies by adding to the clauses giving directors of such companies power to make by-laws regulating the rate of fare a proviso that in cities having more than 100,000 population according to the United States census of 1890 the rate of fare should not be more than three cents, with other restrictions on companies in such cities, and penalties for their enforcement. There was but one city in the state having a population of more than 100,000 according to the census of 1890. *Held*, that the act was special and local, and was accordingly unconstitutional and void, and was not such an amendment as could be made under a reservation of a right to amend the original act for the incorporation of street-railroad companies.

2. INJUNCTION—RESTRAINING CRIMINAL PROCEEDINGS.

When criminal prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available, and a preliminary injunction may properly issue.

Butler, Notman, Joline & Mynderse, Ferd. Winter, Miller & Elam, Benjamin Harrison, and W. H. H. Miller, for complainant.

John W. Kern, for defendants.

Wm. A. Ketcham, for defendant Wiltsie.

Jas. B. Curtis, for defendant city of Indianapolis.

Mason & Latta, for defendant Citizens' St. R. Co.

SHOWALTER, Circuit Judge. This is a motion for a preliminary injunction. Complainant, a New York corporation, is mortgagee to the extent of some $3,000,000 in bonds of all the property of defendant the Citizens' Street-Railroad Company, an Indiana corporation, operating a railroad in the streets of defendant the city of Indianapolis. Defendant Wiltsie is the prosecuting attorney for that district of Indiana which includes the city of Indianapolis. Defendant railroad company was organized under the general incorporation law of Indiana first enacted in 1861, and entitled "An act to provide for the incorporation of street railroad companies." It succeeded by purchase to the railroad property and rights in the streets of Indianapolis acquired pursuant to certain ordinances of that city of a former company organized under the same act for the purpose of constructing, operating, owning, and maintaining a railway in certain streets of Indianapolis. Section 9 of the general incorporation law above mentioned is in the words following:

"The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this state; to prescribe the duties of officers, artificers and servants that may be employed; for the appointment of all officers for carrying on all business within the objects and purposes of such company; and for regulating the running time, fare, etc., of such road or roads."

Section 11 of the same law is as follows:

"This act may be amended or repealed at the discretion of the legislature."

By agreement with the city of Indianapolis pursuant to certain ordinances in that behalf, accepted by defendant railroad company, the rate of fare to be charged could be five cents for each passenger, and such was the rate at the time this bill was filed. In March, 1897,

the legislature of Indiana passed an act entitled and worded as follows:

"An act to amend section nine of an act entitled 'An act to provide for the incorporation of street railroad companies,' approved June 4, 1861, the same being section 4151 of the Revised Statutes of 1881, and adding supplemental sections thereto regulating the fare to be charged and collected by any street railroad company organized under the provisions of said act in any city having a population of 100,000 or more, according to the United States census of 1890, and making it a misdemeanor to demand, charge, receive, or collect from any passenger upon the same a cash fare of more than three cents, providing for the transfer of passengers from any line to another, and for the issuance of transfer tickets or passes, and authorizing such company to make reasonable regulations for the transfer of such passengers.

"(Approved March 6, 1897.)

"Section 1. Be it enacted by the general assembly of the state of Indiana, that section nine of an act entitled 'An act to provide for the incorporation of street railroad companies,' approved June 4, 1861, the same being section 4151 of the Revised Statutes of 1881, be and the same is hereby amended so as to read as follows:

"Section 9. The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this state, and prescribing the duties of officers, artificers and servants that may be employed, and for the appointment of all officers for the carrying on all business within the objects and purposes of such company and for regulating the running time, fare, etc., of said road or roads: provided, however, that in cities in this state having a population of 100,000 or more, according to the United States census of 1890, the cash fare shall not exceed three cents for any one trip or passage upon the street railroad or roads of the same, and every passenger upon such road or roads shall, upon his or her request or demand, without any further cash fare or charge, be transferred from the line upon which he may take passage to and upon any other line or lines in such city owned, controlled or operated by such company to which he paid his cash fare, and such company, its officers, servants, agents or employés shall, upon the request or demand of any passenger, give a transfer ticket or pass to such passenger entitling him to passage upon the line or lines to which he desires to be transferred, so that he may have one continuous trip or passage over and upon any two of its lines, without any additional cash fare or charge to the point nearest his destination: Be it further provided, however, that such directors may provide reasonable regulations for the transfer of such passengers as to place where such transfers shall be made and when such transfer tickets shall expire, but every passenger desiring to be so transferred shall be given a reasonable opportunity to do so and to be carried upon the line to which he desires to be transferred. And should any street railroad company in any such city charge, receive or collect more than three cents cash fare, or refuse or neglect to transfer passengers as herein provided, then said company shall forfeit and pay to the person from whom it receives, charges or collects the said cash fare in excess of three cents, or whom such company refuses to transfer as herein provided, the sum of one hundred dollars, to be recovered in a civil action in any court of competent jurisdiction; and the city in which such railroad company is doing business, running and operating its line or lines of road or roads may, upon the failure of such street railroad company to comply with any of the provisions of this act, declare the rights, terms, contracts and franchises of such company to use and occupancy of the streets, alleys, and highways of such city for street railroad purposes forfeited and at an end and may proceed to oust such company from the use and occupancy of such streets, alleys and highways, and may contract and let to any other street railroad company the use and occupancy of such streets, alleys and highways for street railroad purposes, the same to be granted and let in accordance with the provisions of this act and the laws governing cities having a population of 100,000 or more, according to the United States census of 1890.

"Sec. 2. That it shall be unlawful for any company organized under the provisions of this act and owning, controlling, running or operating any street railroad or system of street railroads in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employé of such company to demand, charge, receive or collect from any passenger upon its road or system of roads a cash fare of more than three cents for any one trip or passage upon the same, and for any violation of the provisions of this section, such company, officer, agent or employé, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars.

"Sec. 3. That it shall be unlawful for any company organized under the provisions of this act, and owning, controlling, running or operating any street railroad system or street railroad in any city having a population of 100,000 or more, according to the United States census of 1890, or any officer, agent, servant or employé of such company, to refuse or neglect to transfer any passenger upon the same, after he shall have paid his fare, from any of its line or lines upon which he may have become a passenger to any other of the lines of such company owned, controlled, run or operated by it in such city and to which he may have requested or demanded to be transferred; or neglect or refuse to give to any passenger after he shall have paid his fare, upon demand or request, a transfer or pass ticket, entitling such passenger to be transferred or carried upon any other of its lines in such city to the point of his destination thereon, or who shall neglect or refuse to receive and carry any passenger after he shall have received a transfer or pass entitling him to be transferred and carried by and upon some line or lines other than that upon which he originally took passage, shall, upon conviction thereof, be fined in any sum not less than fifty dollars and not more than five hundred dollars."

The theory of the bill is that the enactment last above set forth is not within the reservation expressed in section 11 of the act of 1861; that the act of 1861 as amended and in force prior and up to March, 1897, being the general law of the state for the incorporation of street railroads, is the charter of the defendant railroad corporation; that said charter cannot, under the constitution of Indiana, be amended by any enactment which is special to any particular street-railroad corporation or to any particular community or locality in Indiana; that the amendment of 1897 is confined in its operation to the city of Indianapolis and to the defendant railroad corporation and to other street-railroad corporations now or hereafter organized for carrying passengers over the streets of that city; that, if the scheme, as proposed in said amendment, be carried into effect, complainant, which is mortgagee of the railroad property of defendant corporation in Indianapolis to the extent of some $3,000,000 of outstanding bonds, will be irremediably injured in its security; that by the amendment of 1897 the state of Indiana would violate its engagement to the defendant railroad company as expressed in the general law for the incorporation of street-railroad companies; and this in contravention of the national constitution, which declares that no state shall pass any "law impairing the obligation of contracts." On this latter ground, as well as by reason of the nonresidence of complainant, the controversy, it is said, falls within the judicial power of the United States.

Section 22 of article 4 of the constitution of Indiana provides that, except in reference to certain stated matters, "the general assembly shall not pass local or special laws." Section 23 of the same article is: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made ap-

plicable, all laws shall be general and of uniform operation throughout the state." By section 13 of article 11 of the constitution of Indiana it is declared that "corporations other than banking shall not be created by special act, but may be formed under general laws." There is obviously no discretion in the legislature of Indiana whereby that body might, as the basis of a special law for the formation of street-railroad corporations, declare that a law for that purpose which is "general and of uniform operation throughout the state,"—that is, which is applicable to like conditions whenever and wherever such conditions may exist in the state,—could not "be made applicable." The question here is whether or not the amendment of 1897 is a "general law," within the sense of section 13 of article 11 of the constitution of Indiana. This amendment provides "that in cities in this state having a population of 100,000 or more, according to the United States census of 1890, the cash fare shall not exceed three cents," etc. There is but one city in Indiana which answers this description, namely, the city of Indianapolis. No matter how many cities there might be now or may be hereafter in Indiana containing populations respectively of 100,000 or more, the act in question could never apply to any other than the city of Indianapolis. The permanency of the law, and its application to conditions as they arise, and not merely its scope for the time being, is to be considered in applying constitutional tests. The question here is the same as it would be if in fact there had been in Indiana at least two cities each containing 100,000 inhabitants, and the act in question had been expressly limited in its operation to one, leaving the street-car service of the other and of the remaining cities of the state subject to the old law. Could it be said, on the hypothesis last made, that such a law touching the incorporation of street-railroad companies was general and of uniform operation throughout the state? Under the amendment of 1897 the field is open to all persons to organize street-railroad companies, even in the one city identified in that amendment. But the generality and uniformity of operation under like conditions insisted on in the constitution as essential to a law for the formation of corporations must apply to the business for which corporate organization is granted, as well as to the bare privilege of becoming incorporated. A corporation is not formed until its functions or business, as well as the mere right to be a corporation, are identified under the law. To make a corporation, the legislature must declare not only that certain persons may be incorporated, but that in the corporate capacity they may do something, —carry on some specified business. A classification which is germane to the subject-matter, as I understand it, may be provided in a law for the formation of corporations; but an arbitrary specification of a single locality in a business which is not local, whereby one set of statutes would apply in one place and another to a like business in a different place, is not within the organic law of Indiana. What may be called "intramural passenger traffic" is not a business local to any one city in Indiana. A classification of street-railroad companies by reference to the matter of populous-

ness in cities is suggested in the amendment of 1897. But the limitation by the one census—that of 1890—defeats the classification. The vice of the amendment is that it puts street-car service in one city under one set of conditions and sanctions, while the same business in other cities of the state, no matter how populous they are or may become, must be carried on under another. In Mode v. Beasley, 143 Ind. 312, 42 N. E. 728 (decided in 1895), the supreme court of Indiana said:

"Nearly every legislature, if not every one, from that time [1868] to the present has been passing acts that were strictly local under titles and enacting clauses purporting to make them general in their operation throughout the state. A conspicuous example of this class of acts is what is generally known as the 'Charter of Indianapolis,' approved March 6, 1891. But the city of Indianapolis is not named in the act. Both the title and the body thereof purport to make the act general, and of uniform operation throughout the state, by providing 'that all cities of this state which had a population of more than 100,000 inhabitants, as shown by the last preceding United States census, shall hereafter be governed by the provisions of this act.' And then follows the balance of the first section and the other 134 sections of the act, all of which are expressly confined in their operation to the city of Indianapolis by the part of section 1 above quoted, as if the city of Indianapolis had been named as the only place where said act was ever to have any operation or effect whatever. It is to be noted that the act is confined to cities which had a population of more than 100,000 inhabitants as shown by the last preceding United States census. This and all courts in the state judicially know, and the legislature knew, that the city of Indianapolis was the only city in the state at the passage of the act that the last census report showed had more than 100,000 inhabitants. And, no matter how many cities in the state might, by subsequent increase of population, exceed in number the 100,000 mark, still the act could not apply to them, because Indianapolis alone had a population of over 100,000 by the United States census at the time of passage of the act. Hence the legislative intent is made clear and undoubted that the act was designed never to have any effect or operation anywhere in the state outside of the city of Indianapolis, while it purports to be a general act. And yet no one can entertain a reasonable doubt of the constitutionality of the act, not because it purports to be general, but because it is on a subject on which the applicability of a general law has been left by the constitution to the exclusive judgment of the legislature on inquiry into the facts."

By the last sentence above quoted the supreme court of Indiana apparently means that municipal corporations are not within the prohibition of section 13 of article 11. The language of that section, to quote it once more, is, "Corporations, other than banking, shall not be created by special act, but may be formed under general laws." The specification "other than banking" indicates corporations for business purposes and private gain as referred to. The conjunction of words, "municipal corporations other than banking," would be meaningless. In Trust Co. v. Harless, 131 Ind. 452, 29 N. E. 1062, the supreme court ruled, in effect, that a law conferring additional powers on corporations engaged in supplying natural gas could not be special, but must be general and of uniform operation. That court has also ruled that the question whether or not "a general law can be made applicable" when it arises under section 23 of article 4, quoted above in this opinion, is conclusively determined by the legislature. The sense of these holdings, I take it, is that the question whether or not "a general law can be made applicable" never can arise when the subject-matter

of legislation is a law for the formation of corporations within section 13 of article 11. This latter section is itself an express declaration by the people of Indiana in their organic law that "corporations, other than banking, may be formed under general laws"; and there is no discretion on the subject, either in the legislature or the court. To hold that the legislature may—as under section 23 of article 4—declare that "corporations, other than banking," cannot "be formed under general laws," would be to annul section 13 of article 11 of the constitution of Indiana. The members of the legislature themselves in the amendment of 1897 evidently did not deem it in their power to make a special law. By obvious inadvertence the attempted classification was wrongly worded. If it be the law of Indiana that the legislature has this power, then individual charters to individual corporations may once more be granted at pleasure by that body. But this is what section 13 of article 11 was meant more especially to prevent. The language is that "corporations [in the plural] shall not be created by special act," meaning, when read in the light of the antithesis shown in the remainder of the sentence, to prevent any special act, though any combination of persons to the statutory number might become incorporated thereunder. The inhibition is not merely against individual charters to individual corporations, but against any act which is special as distinguished from one which, with reference to the business to be done by corporate organization, is general, and of uniform operation, under like conditions throughout the state. The prevention of possible legislative discrimination or favoritism in business enterprises, and the permanency of property rights secured by the requirement of generality and uniformity in the law of corporate organization, was apparently the intent of the people of Indiana in making their constitution.

It is argued with much insistence that, as respects the legislative power to amend by special enactment, a distinction exists between an amendment which embodies the grant of a new and additional power to a corporation already extant and one which restricts a power previously given; and it is said in this connection on the one side that the amendment of 1897 is, in effect, a restriction on the powers previously vested in the defendant railroad company, and, on the other, that the amendment is rather the extinguishment of all right to make the five-cent charge as provided in the contract between the company and the city of Indianapolis, and the substitution therefor of a grant to the company allowing it to fix a three-cent rate. But, however this may be, the reservation by section 11 of the act of 1861 is of power to amend "this act." The old statute, with the amendment, must, if the amendment be valid, be now read as a whole. So understood, and on the assumption of validity, it constitutes the law of Indiana for the incorporation of street-railroad companies. But, so understood, the entire law would be special and local. As concerns cities other than Indianapolis, it would be special and local, because it could not apply to the city of Indianapolis. As concerns Indianapolis, it would be special and local, because it could have no operation upon street-