

fore he was appointed receiver. There is no allegation that he subsequently became a party to the tariff or that he ratified, adopted or recognized it in any way. It may very well be, in such cases, that it is not for the interest of the trust that contracts and conditions before existing shall be continued. In the present instance the defendant is charged with a crime because he received from a shipper less than a rate established before he existed as receiver and with which he had nothing whatever to do. The rate may have been one which he was not justified in maintaining and certainly if he could not have been held to the schedule in a civil action he cannot be in a criminal action. It seems too plain for argument that no man can be convicted of a crime in failing to keep an agreement unless he is under some obligation to keep it. The defendant here was not a party directly or indirectly to the joint tariff agreement. No authority is cited and it is believed none can be found holding a receiver guilty of a crime in such circumstances. The precise question here presented is believed to be novel, but the general proposition that a receiver is not bound to continue a contract entered into before his appointment and that he acts, not as the agent of the insolvent corporation, but as an independent carrier, is established by abundant authority. *Express Co. v. Railroad Co.*, 99 U. S. 191; *Central Trust Co. of New York v. Marietta & N. G. Ry. Co.*, 51 Fed. 15; *Metz v. Railroad Co.*, 58 N. Y. 61; *Davis v. Duncan*, 19 Fed. 477; *Central Trust Co. of New York v. Ohio Cent. R. Co.*, 23 Fed. 306; *Jones, Corp. Bonds*, § 502; *High, Rec.* § 396; *Beach, Rec.* § 363; *Gluck & B. Rec.* p. 316; 20 *Am. & Eng. Enc. Law*, p. 375.

The demurrer, so far as it relates to the second count, is sustained.

In re THOMAS.

(Circuit Court, S. D. Ohio, W. D. June 30, 1897.)

No. 5,042.

OLEOMARGARINE—USE IN NATIONAL SOLDIERS' HOME—POWER OF STATE TO REGULATE.

The governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses, because his act is that of the government of the United States, within its constitutional powers, and wholly beyond the control or regulation of the legislature of the state.

D. W. Bowman and Harmon, Colston, Goldsmith & Hoadly, for petitioner.

D. L. Sleeper and C. H. Bosler, for the State of Ohio.

TAFT, Circuit Judge. In this case J. B. Thomas has filed a petition for a writ of habeas corpus. His petition states that he was on March 2, 1897, and has since continued to be, governor of the Central Branch of the National Military Home for Disabled Volunteer Soldiers, which is located in Montgomery county, Ohio, on certain grounds purchased, held, and used by the United States for the pur-

poses set forth in an act entitled "An act incorporating a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States," approved March 3, 1865, and the act amendatory thereof, approved March 21, 1866, and other acts amendatory and supplementary thereto; that he is unjustly and unlawfully detained and deprived of his liberty at the city of Dayton, in the county aforesaid, by one L. J. Shafer, a constable of said county, by virtue of a certain warrant of commitment issued by one J. R. Thompson, a justice of the peace within and for said county, charging that the petitioner, as governor as aforesaid, did, on March 2, 1897, unlawfully serve and furnish to the inmates of said National Military Home for Disabled Volunteer Soldiers, as food to be then and there eaten by said inmates, certain oleomargarine, in violation of the statutes of the state of Ohio; that petitioner, being brought before said justice of the peace, refused to plead to said charge, and moved to dismiss the same on the ground that the acts upon which said proceeding was founded were done by him in the discharge of his duty as governor of said national home under the authority of the board of managers in charge of said institution by virtue of the acts of congress aforesaid, and by authority of said acts; that they were entirely done and performed on the grounds acquired, used, and controlled by the United States for the purpose of said home, and with respect to the inmates thereof, only in their maintenance and support by the United States, and not otherwise, said acts having consisted merely in distributing to them supplies procured for such use by authority of congress and said board of managers; that the facts averred above as the ground of said motion are true; that, notwithstanding the premises, said justice of the peace proceeded to try petitioner on said charge, found and adjudged him guilty of the offense aforesaid, and sentenced him to pay a fine of \$50, and stand committed until the same should be paid, and thereupon issued the warrant of commitment aforesaid. Petitioner avers that said justice of the peace had no jurisdiction over the lands and territory whereon said acts were done, or over the petitioner, by reason of said acts, and that said proceedings and warrant of commitment are wholly void. A writ of habeas corpus issued upon this petition. The body of the petitioner was produced into court. The constable made a return that he held the said J. B. Thomas under the commitment of a magistrate as averred in the petition. On the hearing in this court it appeared that there was an agreed statement of facts in the cause before the justice of the peace as follows:

"The following facts are agreed upon to support the issues in the above-entitled cause: It is agreed on behalf of the state of Ohio, Charles H. Bosler, its attorney in this action, being present, and consenting thereto, and the defendant, J. B. Thomas, being present, and, with counsel, also agreeing thereto: (1) That on the 2d day of March, 1897, Joseph E. Blackburn was, and now is, the food and dairy commissioner of the state of Ohio. (2) That on the 2d day of March, 1897, J. B. Thomas was, and now is, the duly chosen and acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in the county of Montgomery, state of Ohio, and as said governor was in charge of the eating house of the said Central Branch of the National Home for Disabled Volunteer Soldiers. (3) Said eating house is used by said J. B. Thomas for serving and furnishing to the inmates of said Central

Branch of the National Home for Disabled Volunteer Soldiers their daily food or rations, and is the only place so provided at said national home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held, and used by the United States therefor; and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof under appropriation made by the congress of the United States for the support of said inmates; and that no placard in size not less than 10x14 inches, having printed thereon in black letters not less in size than 1½ inches square the words 'Oleomargarine Sold and Used Here,' was displayed in said eating house. (4) The affidavit in the cause is made in conformity with an act of the general assembly of the state of Ohio (Ohio Laws, vol. 92, page 23) entitled 'An act to amend section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," passed May 16, 1894': 'Section 1. Be it enacted by the general assembly of the state of Ohio, that section 3 of an act entitled "An act to prevent fraud and deception in the manufacture and sale of oleomargarine and promote public health in the state of Ohio," be amended to read as follows: "Section 3. Every proprietor, keeper, manager or person in charge of any hotel, boat, railroad car, boarding-house, restaurant, eating-house, lunch-counter or lunch-room, who therein sells, uses, serves, furnishes or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining-room, eating-room, restaurant, lunch-room or place where such substance is furnished, served, sold or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'Oleomargarine Sold and Used Here,' and said card shall not contain any other words than the ones above described, and such proprietor, keeper, manager or person in charge shall not sell, serve or dispose of such substance as for butter when butter is asked for or purported to be furnished or served." Sec. 2. Section 3 of the above recited act, passed May 16, 1894, is hereby repealed, and this act shall take effect and be in force from and after its passage.'

By the act of March 3, 1865 (13 Stat. 509), the act of March 21, 1866 (14 Stat. 10), the act of January 23, 1873 (17 Stat. 417), the act of March 3, 1875 (18 Stat. 359), and the act of February 26, 1875 (18 Stat. 524), a national home for disabled volunteer soldiers was established, and the legislation above indicated has been embodied in sections 4825 to 4837, inclusive, of the Revised Statutes of the United States. These sections are now under chapter 3 of title 59 of "Hospitals and Asylums." Section 4825 establishes a board of managers of such home, who are to have perpetual succession, with the power of holding personal and real property, and of suing and being sued. They are also given the power to make rules and by-laws not inconsistent with the law, for the purpose of carrying on the business and government of the home, and to fix penalties thereto. Section 4829 provides that the officers of the home shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the managers may deem necessary. Section 4830 provides that the board of managers shall have authority to procure from time to time, at suitable places, sites for military homes for all persons serving in the army of the United States at any time in the War of the Rebellion, not otherwise provided for, who have been or may be disqualified for procuring their own support by reason of wounds received or sickness contracted while in the line of their duty during the Rebellion; and to have the necessary buildings erected,