

of its property without due process of law, and that, acting in concert with the defendant Webb McNall, and for the purpose of harassing and intimidating the agents and employes of the complainant, he has threatened to, and will, unless restrained by the court, commence proceedings against complainant, its agents and employes, and compel it to defend a multiplicity of suits in actions instigated by said McNall and said Louis C. Boyle for the purpose of preventing complainant from peaceably transacting its business of life insurance within the state of Kansas, and designed by the defendants, McNall and Boyle, to deny to complainant the equal protection of the laws, and deprive it of its property within the state of Kansas without due process of law. The prayer of the bill is for a decree adjudging that it is the duty of said Webb McNall, as superintendent of insurance, to forthwith issue and deliver to the complainant a certificate of authority to do business within the state of Kansas, and also that the court grant a temporary injunction against the said Webb McNall, as superintendent of insurance of the state of Kansas, his agents and employes, and against the said Louis C. Boyle, as attorney general of the state of Kansas, enjoining and restraining each of said defendants, and all persons acting under them, from in any manner whatever interfering with the transactions by the complainant in the state of Kansas of its said business of life insurance, and for all other relief.

This petition and application for restraining order were presented to one of the United States district judges who was assigned to hold court in the district of Kansas, who thereupon granted a restraining order, restraining the defendants, McNall and Boyle, from interfering with said insurance company, in accordance substantially with the prayer of the petition; said restraining order to remain in force only until the next term of court to be holden where the said action was commenced. At the hearing the defendants interposed a demurrer to said complaint, and all questions involved and raised by the demurrer are submitted to the court for final determination.

There are two questions of law involved in this case. The first is as to the power of the court to grant the relief prayed for, taking into consideration the provisions of the eleventh amendment to the constitution of the United States, which, it is urged by the defendants, prohibit the court from proceeding in any manner against the defendants, because they are officers of the sovereign state of Kansas, and they are within the prohibition, and are protected by the provisions of said amendment from being required to answer, or restrained from acting, in any manner, as officers of said state. That the question involved is one of importance need not be asserted, and this court desires to express at the very threshold of the investigation a lifelong conviction and adherence to the doctrine that the rights of the states under our form of government should at all times receive proper protection, especially at the hands of the judicial department of the general government; and while it will, in the discharge of its duty, endeavor to enforce all laws of the United States, it will also, under all circumstances, "render unto Cæsar the things that are Cæsar's," and abstain from encroaching in any manner upon the rights of any sovereign state or the officers thereof.

The question of the force and effect of the eleventh amendment to the constitution of the United States, and to what extent the officers of the several states are exempt, under it, from any process of control by the courts of the United States, has been a subject of adjudication upon many occasions, and has been many times decided, by the supreme court of the United States. I deem it unnecessary to refer to all the decisions, but begin with the decision in the case of *Board v. McComb*, 92 U. S. 531. In that case the court used the following language:

"Although a state, without its consent, cannot be sued by an individual, nor can a court substitute its own discretion for that of the executive officers in matters belonging to their proper jurisdiction, yet when a plain official duty, requiring no exercise of discretion, is to be performed, and performance refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other."

In the case of *Cunningham v. Railroad Co.*, reported in 109 U. S. 446, 3 Sup. Ct. 292, 609, the court, referring to the case of *Board v. McComb*, supra, uses the following language, "In the opinion in that case the language used by Mr. Justice Bradley well and tersely expresses the rule and its limitations," and then quotes approvingly the language used by Justice Bradley in that opinion. In the case of *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962,—it being one of the celebrated Virginia Coupon Cases,—the court again quotes the language of the decision in *Board v. McComb* approvingly, as well as the other cases of like character that had been theretofore decided by the supreme court. The case of *Hagood v. Southern*, reported in 117 U. S. 52, 6 Sup. Ct. 608, is a case that seems to be relied upon by the defendants to show that suits of the character now under consideration are prohibited by the eleventh amendment to the constitution of the United States. The supreme court in that case, on page 69, 117 U. S., and page 616, 6 Sup. Ct., uses the following language:

"The principle which governs in the cases that are cited must be carefully distinguished from that which ruled in *Osborn v. Bank*, 9 Wheat. 738, *Davis v. Grey*, 16 Wall. 203, *Board v. McComb*, 92 U. S. 531, and *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962,—a distinction which was pointed out in *Louisiana v. Jumel* [2 Sup. Ct. 128], and in *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609. The rule for such cases is well stated by Mr. Justice Bradley in *Board v. McComb*, and is as follows:" (Then quoting the language used by Justice Bradley in that case, with approbation.)

In *Re Ayers*, reported in 123 U. S. 443, 8 Sup. Ct. 164, and which is the case relied upon with seeming entire confidence by the counsel for the defendants in this case, the court uses the following language:

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, under color of the authority of unconstitutional legislation by the state, who are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. In respect to the latter class of cases, we repeat what was said by this court in *Board v. McComb*, 92 U. S. 531:" (Then quoting the language of Justice Bradley in that case.)

In the case of *Scott v. Donald*, reported in 165 U. S. 58, 17 Sup. Ct. 265, the court uses the following language:

"Where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, or, in a proper case, for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial, such case is not, within the meaning of the eleventh amendment to the constitution, an action against the state."

One of the most authoritative cases upon this subject is *Reagan v. Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1051, in which that eminent jurist, Justice Brewer, used the following language:

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. \* \* \* Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts."

It seems clear, then, that it is the well-settled doctrine that where an officer of a state, in the language as used by Judge Bradley in the case of *Board v. McComb*, is in the discharge of a plain official duty, requiring no exercise of discretion in the act to be performed, and performance is refused, any person who sustains personal injury for such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. The federal courts may entertain jurisdiction in suits by persons against such officer, and may afford adequate remedy by a mandatory injunction in order to protect the rights of parties injured by the action of said state officer. It only remains, then, to inquire, what are the duties of the defendant McNall, as superintendent of insurance of the state of Kansas, as declared by the statutes of said state? The law of Kansas prior to the year 1889, in relation to the duties and powers of the state superintendent of insurance, as defined and declared by the supreme court of Kansas, seem to be as follows: Referring to the different sections and provisions of the insurance laws, the court declares:

"These and other provisions of the statute relating to insurance and to the superintendent of insurance clearly show that many of the duties of that officer are discretionary; and this is especially true regarding the granting, withholding, or revoking of authority to insurers to transact business within the state." *Insurance Co. v. Wilder*, 40 Kan. 568, 20 Pac. 268.

And it was held by the supreme court of the state of Kansas in the case of *Insurance Co. v. Wilder*, above referred to, that the state superintendent of insurance had the absolute right to refuse to any company a license to transact business in this state, regardless of their solvency or their having complied with the requirements of the law. After this decision, referred to in 40 Kan. 561, 20 Pac. 265, the legislature that met soon after, or perhaps that were then in session, passed the law that is now in force in relation to the duties of state insurance commissioner; but the contention of the defendant is that that amendment only relates to home mutual fire insurance companies, and that, by the wording of the title of the act, no provision relating to any other kind of insurance companies could be properly enacted under said title. The act in controversy is known as "Chapter 159, Session Laws of 1889," and went into effect in March of that year. It is entitled "An act relating to insurance and amendatory of section 24 of chapter 132 of the Laws of 1885, being an act entitled 'An act to provide for the organization and control of mutual fire insurance companies,'" and contains the following language:

"Provided, however, that the superintendent of insurance shall have no power or authority to refuse an insurance company a certificate of authority to do business in the state, if such company is solvent and has fully complied with the laws of the state. And provided, further, that such superintendent of insurance shall have no power to revoke or suspend the certificate of authority of any association or corporation transacting the insurance business, if such association or corporation is solvent and complies with all the laws of this state. Also, it is further provided that in all actions brought against the superintendent of insurance to compel him by mandamus, or otherwise, to issue certificates of authority to any association or corporation desiring to transact insurance business in this state, and in all cases brought against the superintendent of insurance to restrain or enjoin him from revoking or suspending the certificate of authority of any association or corporation transacting insurance business in this state, such action or actions must be commenced and maintained in the county where the office of superintendent of insurance is located and carried on."

It would seem that the language of the act embraces all insurance associations or corporations desiring to transact business in Kansas. The language of the title being "An act relating to insurance and amendatory of section 24, c. 132," etc., the title of the act seems certainly broad enough to cover any legislation in relation to insurance or insurance companies. Referring to the contention of counsel for the defendant that the act was not intended and designed to affect the duties of the state superintendent of insurance in relation to any but home mutual fire insurance companies, it may be proper to state that up to the year 1871 there was no law of the state of Kansas requiring insurance companies of any kind, incorporated by the laws of the state of Kansas, to have any certificate or license in order to transact business. By the act of 1871, creating the insurance department in the state of Kansas, under the head, "Insurance Other than Life," sections 29 and 30 of

said act will be referred to, as important in this connection and upon this point. Section 29 is as follows:

"It shall be lawful for any insurance company incorporated under the laws of this state for any purpose other than life insurance, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on real estate," etc. (the balance of the section directing in what manner its funds shall be invested).

Section 30, at length, is as follows:

"Upon the complying with the foregoing provisions by any such insurance company, the superintendent of insurance shall cause an examination to be made, either by himself or some disinterested person, specially appointed by him for that purpose, who shall certify under oath that the capital herein required of the company named, according to the nature of the business proposed to be transacted by said company, has been paid in, and is possessed by it in money, or in such stocks and bonds or mortgages as are required by the 29th section of this statute, in an amount not less than one hundred thousand dollars. Such certificate shall be filed in the office of such superintendent, who shall thereupon deliver to such company a certified copy of such certificate, which, upon being recorded in the office of the register of deeds of the county where the company is located, in a book provided for that purpose, shall be their authority to commence business and issue policies."

This is the law of Kansas to-day in relation to fire insurance companies incorporated under the laws of Kansas, and it was in full force and effect at the time of the decision in *40 Kan. of Insurance Co. v. Wilder* (40 Kan. 561, 20 Pac. 265). The decision in that case was in relation to the rights of fire insurance companies which were not organized or incorporated under the laws of the state of Kansas, but were foreign corporations; and by the reading of the section referred to, and its careful consideration, the court is at a loss to know what additional legislation in the way of relief from any oppression by the state superintendent of insurance the mutual home fire insurance companies of the state of Kansas needed or required. That the decision of the supreme court of the state, deciding, as it did, that the state superintendent of insurance, in relation to foreign insurance companies, had discretionary power to refuse or grant a license or certificate to do business, delivered, as it was, in January, 1889, was the prime factor moving the legislature to pass the amendment to the insurance laws, as heretofore stated, seems to me a clear proposition, requiring no argument to support it. That some such legislation was imperatively needed, the action of the state superintendent of insurance in the case at bar would clearly show. The action of the superintendent, in this case, refusing to grant a license to transact business in the state to a company that he himself admits to be solvent and to have complied with the laws of the state, for the reason contained in his letter to the agent of the insurance company, to state it very mildly, is arbitrary, and is an assumption of authority by a ministerial officer that is startling. The reason for the refusal, as announced in his letter, is because they have not treated Mrs. Sallie E. Hillman, whose husband held a policy in this company, fairly, and the refusal to pay said policy to her is the sole basis of his refusal to grant a license to the company to do business in the state of Kansas. In this connection it is proper that the court should state the condition of said claim, as it was well known to the insurance commissioner at the time of said

refusal. An action to recover upon said policy has been pending in the courts of the United States in the district of Kansas for more than 18 years. The action has been tried five times in said courts, and the trials presided over by five different judges, beginning with the fair-minded, learned, and able jurist who has presided over the courts in said district for nearly a quarter of a century, and the next in the order of trials presided over by that eminent jurist, Associate Justice Brewer, who was at that time United States circuit judge for the eighth judicial circuit, and the next time in the order of trials presided over by a judge of large experience and eminent learning, Justice Shiras, of Iowa, followed next in order by the late lamented Judge Thomas, of North Dakota, and lastly by the district judge delivering this opinion; and the only success in determining this issue that has been properly raised in the courts of the United States between the insurance company and Mrs. Hillman has been four mistrials, and a verdict and judgment at one trial which were reversed by the supreme court of the United States. And at this time, after these repeated trials, and the case still pending in the United States court, for an officer clothed with any power or authority to refuse to grant any insurance company whatever a license or a certificate to transact business in the state, because of their refusal to pay a claim thus contested and thus tried, is virtually a denial to such parties of their right to submit any case to a final determination by a jury of their country. This action by the state superintendent of insurance, refusing to grant a license to another life insurance company for the same reason that it is denied in this case, upon being called to the attention of the district judge of this district, was deemed by him such an interference with the administration of the law and with the rights of litigants in his court that he called the attention of the United States grand jury to said action, and it appears by the records of said court that the grand jury have found an indictment against him for such interference. Looking to the existing evil sought to be corrected by the legislature, it would seem, then, that it is small wonder that the legislature of 1889, perhaps foreseeing that such arbitrary power vested in any one individual would lead to just such results as it has in this case and in the other case referred to, intended, by their amendment of the insurance laws, to deprive him of such discretionary power, for it ought not to and cannot exist in a state or country where the right of a trial by jury is ever held to be the palladium of the liberties and the rights of the people. It would seem, from the history of the state of Kansas, that it certainly could not long exist here. The pioneers of the state of Kansas were eminent and distinguished in their assertion of equal rights to all persons under the law; and her statehood, under its constitution, which breathes in all its provisions the principles of freedom, and the right of every one to seek redress for all grievances and the enforcement of all rights by recourse to the laws, and to be protected by the laws, was the result of the actions of the Kansas pioneers of 1855, 1856, 1857, and of all the stormy years that have passed, and are a part of the history of the territory, up to its admission as one of the great states of this Union. It may well be admitted and considered that the law-makers of 1889 were of the pioneers of 1856 and 1857 and 1860, or

their immediate descendants; and the intention of those lawmakers, it may well be concluded, was to enact a law asserting that no officer should have the arbitrary right to deprive any person, natural or artificial of the enjoyment of the right of trial by jury in any case whatsoever. If such was not their intention and desire, it must be admitted that the ardent desire for freedom and liberty which animated their breasts in the early years had departed, and that the soul of that great leader of the pioneers of Kansas, the man of Osawatomie, had at that early period in the history of the state ceased "to go marching on." That in the enactment of this law they may have builded better than they knew, may be admitted; but this is true of the framers of not only the constitution of the United States, but of many of the beneficent laws that have been enacted, and that are now upon the statute books of the United States and of the various states of this Union. That it is the law of this state regulating the duties and powers of the state superintendent of insurance, after a careful consideration of it, I have not the slightest doubt. That being the case, it follows that in relation to the duty of the state superintendent of insurance to grant a license to transact business in this state to any insurance company that is solvent and has complied with the laws of this state, he has no discretion whatever, and the law is mandatory upon him to grant such license whenever the conditions stated in the law are complied with. This brings his action within the exceptions and rules laid down concerning actions that may be brought against a state officer under the eleventh amendment to the constitution of the United States, as held by the numerous decisions of the supreme court of the United States, and determines that the federal court of this district has jurisdiction to hear and determine this issue.

As to the right of the complainant company to have a mandatory injunction against him, there seems to be no question, because the complaint states unequivocally that it has property in this state, in a large amount, that is affected by the action of the state superintendent of insurance, and this is not denied by either respondent. In fact, a denial of it would be futile. It is admitted that this complainant has effected insurance upon the lives of more than 3,000 persons in the state of Kansas, and the amount of the policies exceeds the sum of \$7,000,000. It is manifest that, if it is prohibited from keeping up its business in the state, its property rights would be, if not destroyed, materially injured, and the injury is apparently irreparable,—the state superintendent of insurance being declared by the complainant to be insolvent, and that insolvency not denied; thus affording to the complainant a right, in a court of chancery, to have its interests in this large property protected by the courts of the United States.

I might well have been content to have allowed this case to be decided by a simple reference to the decision of the learned district judge who presides over this district in the case of *Insurance Co. v. McNall*, 81 Fed. 888, in which opinion I fully concur; but I have deemed it best to submit my conclusions in the matter in this opinion, craving the indulgence of all parties, and the bar generally, for the very crude manner in which it has been prepared in the very short time that I have been able to give to its consideration.

The relief prayed for in the bill is granted, and a perpetual injunction shall issue against the defendant Webb McNall, as state superintendent of insurance of the state of Kansas, restraining him from in any manner interfering with the company or its agents in the transaction of insurance business in the state of Kansas, and commanding him to issue a license to said company as required by the laws of the state of Kansas, and restraining all others that may act, or be called upon to act by him, from interfering with said company in the transaction of business in the state as above stated. But the respondent the attorney general of the state of Kansas is not included within this injunction, to the extent of prohibiting him from bringing any suit of quo warranto against said company in any of the courts of this state to test its right to transact business in the state; but he is restrained from acting as contemplated by the statute of the state of Kansas, upon the request of the insurance commissioner, in bringing suits other than quo warranto against the company or its agents for transacting its business in the state.

I may add, in conclusion, that the company having, in the judgment of the court, complied with all the requirements of the law of the state (having demonstrated to the entire satisfaction of the insurance commissioner that it is solvent, and tendered him the amount of fees required to be paid before a license could be obtained), it has done all that it could do, or the law required of it to do; and the arbitrary refusal of the superintendent of insurance to grant it a license does not, in my judgment, prevent its transacting business in the state, and consequently it should not be interfered with or prevented from transacting such business; for, if the superintendent of insurance is without discretion to refuse a license to the company upon its compliance with the requirements of the laws of the state, it follows that, if it has so complied with the laws in all respects, such compliance has the full force and effect of a license to transact business, for it has done all it was required to do, and all that it could do.

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#### HEED v. COMMISSIONERS OF COWLEY COUNTY, KAN.

(Circuit Court, D. Kansas, Second Division. September 13, 1897.)

##### 1. MUNICIPAL CORPORATIONS—BOND ISSUES—RECITALS—INNOCENT PURCHASERS.

"Where a municipal body has lawful authority to issue bonds, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them." *Commissioners v. Aspinwall*, 21 How. 539.

##### 2. SAME.

This principle covers a case of county bonds issued for 30 years straight, and certified to have been issued "in pursuance of, and in accordance with, the vote of a majority of the qualified electors of the county," though an examination of the county records would have shown that the vote of the people only authorized, in fact, an issue of bonds due in 30 years, but subject to payment in 10 years.