

KIERNAN v. MULTNOMAH COUNTY.

(Circuit Court, D. Oregon. July 28, 1899.)

No. 2,544.

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

The provision of the fourteenth amendment to the constitution against depriving a person of his property without due process of law is a prohibition upon the states, and not upon individuals; and a suit to enjoin a threatened taking of complainant's property, which it is alleged will be without any authority of law, does not involve a federal question.¹

2. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to obtain a construction of a state law, which complainant alleges is being misinterpreted and misapplied in violation of his constitutional rights, does not involve a federal question.

This was a suit to restrain a sheriff from selling complainant's property for certain taxes.

Charles F. Lord and A. C. Spencer, for complainant.
Alex Bernstein and M. L. Pipes, for defendant.

BELLINGER, District Judge. This is a suit by a resident and citizen of the state of Oregon against the sheriff of Multnomah county to restrain the collection of certain taxes for which the sheriff has a warrant, and under which he threatens to sell complainant's property for unpaid assessments. The substance of the complaint is that the tax and proceeding are not authorized by the law of the state in pursuance of which the sheriff is acting, and that to permit the sale of the complainant's property in the manner threatened would be to take his property "without due or any process of law, and in violation of section 1 of article 14 of the constitution of the United States of America, in that the same would abridge the privileges and immunities of the complainant, and deprive him of his real properties," described in the complaint, "without due protection of law." The fourteenth amendment has reference exclusively to state action, and not to any action by individuals. It is a prohibition upon the state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," or which shall "deprive any person of life, liberty, or property without due process of law." It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals (*Virginia v. Rives*, 100 U. S. 318; *U. S. v. Cruikshank*, 92 U. S. 542; *Civil Rights Cases*, 109 U. S. 11, 3 Sup. Ct. 18), otherwise every invasion of the rights of one person by another would be cognizable in the federal courts under this amendment. The questions sought to be presented in this case relate to the interpretation to be given a law of the state, and the complaint is that this law is being misinterpreted and misapplied, to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite

¹ For jurisdiction of federal courts in cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

diverse citizenship and amount in controversy to give the court jurisdiction, the remedy for the injuries complained of is in the state courts. The bill of complaint is dismissed.

INTERNATIONAL TRUST CO. v. T. B. TOWNSEND BRICK & CONTRACTING CO. (two cases).¹

(Circuit Court of Appeals, Sixth Circuit. July 5, 1899.)

Nos. 642, 643.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—PARTIES.

The jurisdiction of a federal court is not defeated in a suit brought only against defendants who are citizens of other states than the complainant because the bill discloses that there are other citizens of the same state with complainant who might properly have been made defendants.

2. APPEAL—RIGHT TO QUESTION EQUITY JURISDICTION—WAIVER.

Where a railroad company filed a bill in equity, alleging its inability to meet its obligations, and praying the court to appoint a receiver to operate its road, and to preserve and administer its property in the interests of its creditors and stockholders, a mortgagee, which entered a voluntary appearance in the suit, and also answered, and contested a petition of intervention filed by a creditor seeking to establish a preferred claim, without questioning the equitable jurisdiction of the court to entertain the suit or the petition of intervention, cannot raise the question of such jurisdiction for the first time on appeal.

3. RAILROADS—PRIORITY OF LIENS—OPERATING EXPENSES.

The doctrine announced in *Fosdick v. Schall*, 99 U. S. 235, and the cases following it, is that the current income of a railroad is primarily applicable to the payment of its operating expenses, including proper equipment and necessary repairs, and that such expenses are an equitable charge on the income earned during a receivership, though incurred previously by the company, within such reasonable time as shall be fixed by the court, and without regard to whether or not income has been diverted; but the right to such preference extends to income only, and the rule does not authorize a court to displace liens on the corpus of the property in favor of supply creditors, except where, and to the extent that, income which should in equity have been applied to the payment of their claims has been diverted for the benefit of the lienholders, either by the payment of interest therefrom, the purchase of property, or in making permanent improvements on the property; and where there has been no such diversion, either before or during the receivership, and there are no surplus earnings of the receivership, a supply creditor of the company is not entitled to payment from the proceeds of the road, when sold, in preference to the mortgagees.

4. SAME—PERMANENT BETTERMENTS.

A claim against a railroad company for building a bridge on its line, though such bridge constituted a permanent betterment of the property, is not entitled to preferential payment over an existing mortgage from the proceeds of the road when sold under foreclosure.

Appeals from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an appeal from a decree awarding priority over several pre-existing railroad mortgages to a debt due from the mortgagor company to the appellee for the construction of the pier and abutments of a railroad bridge over the Cuyahoga river in the city of Cleveland, Ohio. This claim was asserted by an intervening petition filed by the appellee in the case of *Cleveland, C. & S. Ry. Co. v. Knickerbocker Trust Co.*, 86 Fed. 73, a cause pending in the cir-

¹ Petition for rehearing pending.