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represented by the bonds is part of the school fund and is very much wanted for the schools. This seems to us sufficient reason for advancing the causes. They will, therefore, be specially assigned for hearing on Monday, the 4th of March, unless the counsel agree upon a different day.

Motion granted.

Mr. R. T. Merrick, Mr. Geo. Taylor and Mr. T. J. Durant for the motion. *Mr. Walter S. Cox and Mr. J. Hubley Ashton* opposing. *Mr. Caleb Cushing*, for the Bank of Washington, opposing.

WILLIAMS, COLLECTOR, v. REYNOLDS, AGENT, ETC., OF THE
LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF INDIANA.

No. 93. December Term, 1872. — Decided January 20, 1873.

Since the passage of the act of July 13, 1866, c. 184, §§ 67, 68, 14 Stat. 172, and the repeal of § 50 of the act of June 30, 1864, 13 Stat. 241, the Circuit Courts of the United States have no jurisdiction of cases arising under the internal revenue laws, to recover duties illegally assessed, and paid under protest, unless the plaintiff and defendant in such suit are citizens of different States.

THE case is stated in the opinion.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Internal Revenue taxes were assessed against the aforesaid Railroad Company, or against the plaintiff as their agent and trustee; and the plaintiff, as such agent and trustee, denying the legality of a portion of the tax, brought an action of *assumpsit* in the Circuit Court of the United States for that district against the defendant, the Collector of Internal Revenue, to recover back that amount, as having been unlawfully assessed by the assessor and illegally exacted by the defendant as such collector.

It appeared by the declaration that the net earnings of the Railroad Company for the period therein specified, were duly and correctly reported to the assessor, and that the assessor assessed the same as required by law, and that the plaintiff, as the agent and the trustee of the Company, paid the amount of the tax without complaint.

None of those proceedings are drawn in question; but it also appears that the Company had on hand at that time the sum of one hundred thousand dollars invested in government bonds, the same being a surplus fund which accrued from the net earnings of an

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earlier period ; and that the assessor also levied an internal revenue tax of five per cent on that fund, to which the defendant, as such agent and trustee, objected and appealed to the commissioner for relief, which was denied by the commissioner ; and it appears that he affirmed the action of the assessor.

Payment having subsequently been demanded, the plaintiff submitted and paid the tax, and brought this action to recover back the amount. Service was made and the defendant appeared and demurred to the declaration, but the court, having heard the parties, overruled the demurrer, and the defendant was permitted to plead to the merits.

Subsequently, the defendant filed a special plea in bar of the action in substance and effect as follows : That the fund assessed was a surplus fund of the Company ; that the same nor any part thereof had ever been divided among the stockholders, nor paid over to them, or passed to their credit ; that it was retained and held by the Company as a corporation ; and that the legal title to the same remained vested in the Company ; that the fund accrued from earnings of the Company, and was gain, profit and income ; and that it was duly assessed as such against the plaintiff for that year ; and that the tax was duly collected by the defendant as such collector.

Instead of replying and taking issue upon the matters of fact set forth in the plea, the plaintiff filed a general demurrer to the same, and the defendant joined in demurrer. Hearing was had, and the court sustained the demurrer, and rendered judgment for the plaintiff, and the defendant sued out a writ of error and removed the cause into this court.

Examination to any extent of the merits of the controversy is unnecessary, as the only error assigned by the present plaintiff is, that the Circuit Court had no jurisdiction of the suit, as both parties are citizens of the same State, and it is quite clear that the error assigned is sufficient to dispose of the case, as it appears from the pleadings that the matter of fact alleged to show a want of jurisdiction in the Circuit Court is well founded.

Assumpsit for money had and received is undoubtedly the appropriate remedy to recover back moneys paid under protest for internal revenue taxes illegally exacted, or where an appeal in such a case was duly taken before making the payment to the Commissioner without success ; and if commenced in the state court the

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action may be removed on petition of the defendant into the Circuit Court for the district where the service was made, and in that state of the case the jurisdiction of the Circuit Court is clear beyond doubt, irrespective of the citizenship of the parties, as it is made so by the express words of an act of Congress.

All cases in law or equity arising under the revenue laws were declared to be cognizable in the Circuit Courts by the act of the 2d of March, 1833, unless where it appeared that other provisions for the trial of the same had previously been made by law. 4 Stat. 632.

Doubts were entertained whether cases arising under laws subsequently passed, to levy and collect internal revenue taxes, would be included in that provision, as no such acts were in force at the time that act was passed; and to remove all such doubts upon the subject, Congress, on the 30th of June, 1864, enacted that the provisions of that act "shall be taken and deemed as extending to and embracing all cases arising under the laws for the collection of internal duties, stamp duties, licenses or taxes, which have been or may be hereafter enacted." 13 Stat. 241.

Beyond doubt, the effect of that enactment was to confer upon the Circuit Courts original jurisdiction in all cases, whether in law or equity, arising under the laws passed to levy and collect internal revenue taxes; but Congress, on the 13th of July, 1866, repealed the section of the act conferring such jurisdiction, and also enacted that the original act conferring such jurisdiction in certain revenue cases, entitled "An Act to provide for the Collection of Duties on Imports," shall not be so construed as to apply to cases arising under an act entitled "An Act to provide Internal Revenue to support the Government," or any act in addition thereto or in amendment thereof, nor to any case in which the validity or interpretation of said act or acts shall be in issue. 4 Stat. 632; 14 Stat. 172, §§ 67, 68; *Hornthall v. Collector*, 9 Wall. 560, 565; *Insurance Co. v. Ritchie*, 5 Wall. 541.

Since the passage of the last-named act, and the repeal of the 50th section of the prior act, the Circuit Courts have no jurisdiction of cases arising under the internal revenue laws, to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant in such suit are citizens of different States. Such action, if the parties are citizens of different States, may be commenced in the Circuit Court; but if they are citizens of the same

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State, the suit must be commenced in the state court and be prosecuted there, unless it is removed into the Circuit Court for the same district, in pursuance of some one of the acts of Congress passed for that purpose. *Assessor v. Osborne*, 9 Wall. 567; *Philadelphia v. Collector*, 5 Wall. 720, 728.

Jurisdiction of the Circuit Courts in suits of a civil nature at common law or in equity, as conferred by the 11th section of the Judiciary Act, extended only to cases where the United States are parties or petitioners or where an alien is a party, or where the suit is between the citizen of a State where the suit is brought and a citizen of another State; but the 12th section of the act made provision that the defendant, in certain cases and under certain conditions, might remove the cases from the state court into the Circuit Court "to be held in the district where the suit is pending." 1 Stat. 78.

Amendments have been enacted to the provision giving authority to the defendants to remove such cases from the state courts into the Circuit Courts, extending that right, and even conferring the same right in a limited class of cases upon the plaintiff; but it is unnecessary to enter into any discussion of those provisions, as no one of them has any tendency to support the jurisdiction in this case. 4 Stat. 632; 12 Stat. 756; 14 Stat. 46, 172, 307, 558; 15 Stat. 227, 253, 267; 16 Stat. 261, 440.

Viewed in any light, it is quite clear that the Circuit Court had no jurisdiction of the case.

Judgment reversed, and the cause remanded, with directions to dismiss the suit for want of jurisdiction.

Mr. Attorney General for plaintiff in error. *Mr. J. E. McDonald* and *Mr. A. L. Roache* for defendant in error.

MAYS v. FRITTON.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 553. December Term, 1872. — Decided February 10, 1873.

The claim set up in the state court being founded on the Bankruptcy Act, and the decision of the state court being adverse to it, this court has jurisdiction to review it.

MOTION TO DISMISS. The case is stated in the opinion.

MR. CHIEF JUSTICE CHASE delivered the opinion of the court.