We find no error in the record, and the judgment of the Circuit Court is

AFFIRMED.

CITY OF PHILADELPHIA *v.* THE COLLECTOR.

1. The jurisdiction of the Circuit Court in a case between citizens of the same State, under the internal revenue laws of July 1, 1862, and March 3, 1863, removed thereto from a State court under the act of March 2, 1833 (the Force Bill), and before the passage of the internal revenue act of June 30, 1864, is saved by the sixty-eighth section of the internal revenue act of July 13, 1866, if the justice of said Circuit Court is of opinion that the case would be removable from the State court to the Circuit Court under the sixty-seventh section of the said act of July 13, 1866.
2. Where a case, removed from a State court to a Circuit Court under the act of 1833, above mentioned, would be clearly removable under the provisions of the act of 1866, directing such Circuit Court to remand removed cases, unless the circuit judge should be of opinion that the same, if pending in the State court, would be removable under a provision which the last-named act made, the fact that the case was in the Circuit Court when the new act passed, and that it never was remanded, is a fact from which it may be inferred, as a conclusion of law, that it was the opinion of the circuit judge that the case was one that ought to be retained.
3. Where an article (as illuminating gas) which, under the internal revenue acts, is taxable when made and "sold," but is not taxable when made by the party "for his own use," is made by trustees appointed by the party using it, under obligatory and fixed arrangements with such party's creditors, at an establishment of which the party using the article has apparently the ultimate ownership, but which, till certain debts due by him, and contracted in order to build and enlarge the establishment, are paid, is held and managed exclusively by the trustees, under an arrangement that the party using may have the article at a certain price, and that all clear profits shall be set aside as a sinking fund for the payment of the principal due the creditors,—such article, when furnished to the debtor at a price fixed, is "sold," and taxable; though apparently the sale is chiefly for the purpose of providing, in the manner agreed on, a sinking fund to pay the debts of the party using it.
4. The trustees of the Philadelphia Gas Works, by the law and ordinances creating and constituting them, and by reason of the several loans created for the support and management of the said gas works, hold such a relation to the private consumer, the loanholder, and the city of Philadelphia, that all illuminating gas manufactured by the said trustees, and

furnished by them to the city, to be used in her public lamps,—is liable to, and chargeable with, the internal revenue duty imposed by the act of July 1, 1862, and the supplement thereto of March 3, 1863.

ERROR to the Circuit Court for Eastern Pennsylvania; the case being thus:

The Judiciary Act of 1789 limits the jurisdiction of the Federal courts, so far as determined by citizenship, to "suits between a citizen of the State in which the suit is brought and a citizen of another State."

An act of 1833,* "to provide further for the collection of *duties on imports*," extended the jurisdiction to cases arising under "*the revenue laws* of the United States," where other provision had not been made. And it authorized any person injured, in person or property, on account of any act done "under any law of the United States for the protection of *the revenue or* the collection of duties on imports," to maintain suit in the Circuit Court. It also allowed any person sued in a State court, on account of any act done "under the *revenue laws* of the United States," to remove the cause by a mode which the act itself set forth, into the Circuit Court of the United States.

With the passage of the internal revenue laws, made necessary by the late rebellion, it was doubted by some persons whether this act of 1833 extended to cases under the new enactments. And the internal revenue act of 1864,† by its fiftieth section extended in general words "the provisions" of the act of 1833 to cases arising under the *internal* revenue acts.

By an internal revenue act of 1866,‡ however (§ 67), Congress made provision for removing cases from State courts to the Circuit Court, authorizing such removal in a way which it particularized, "in any case, civil or criminal, where suit or prosecution shall be commenced in any court of any State against any officer of the United States, . . . or against any person acting under or by authority of any such

* 4 Stat. at Large, 632. † 13 Id. 241. ‡ 14 Id. 172.

officer, on account of any act done under color of his office," &c.

And by the sixty-eighth section, immediately following, it "repealed" the fiftieth section of the act of 1864, with, however, this proviso:

"*Provided*, That any case which may have been removed from the courts of any State *under said fiftieth section* to the courts of the United States, shall be remanded to the State court from which it was so removed, with all the records relating to such cases, unless the justice of the Circuit Court of the United States in which such suit or prosecution is pending shall be of opinion that said case would be removable from the court of the State to the Circuit Court under and by virtue of the provisions of *this* act."

With the act of 1833 in force, but before the passage of any of the others, the city of Philadelphia, in October, 1863, sued in a State court the collector of *internal* revenue of the collection district to which the city belongs, for a return of certain internal revenue taxes paid under protest; the city corporation (constructively) and the collector being citizens of the same State.

The collector assuming that the case was one arising "under the revenue laws of the United States," and that it was, therefore, within the act of 1833, removed it by the mode prescribed in that act of 1833 into the Circuit Court. This was in November, 1863. And the Circuit Court having been, apparently, of the same opinion as to the extent of operation of the act of 1833, tried the case twice, the first trial beginning in December, 1863; therefore, before the internal revenue act of 1864, having its fiftieth section, was passed. A new trial was had in October, 1864, and final judgment then given.

The suit thus brought in the State court and removed, was to recover internal revenue taxes accrued under the internal revenue acts of 1862 and 1863, demanded by the collector and paid under protest by the "Trustees of the Philadelphia Gas

Works," for gas used by the city for its public lamps. Supposing jurisdiction to have existed in the Circuit Court, the question was whether this gas had been "made and sold" by the trustees to the city, or whether it had been made by the city through its appointees, the trustees, for itself. If the former, it was taxable under the provisions of the revenue acts, which taxed all gas "made and sold;" if the latter, it came within an exception which exempted articles made by any person "not for sale, but for his or their *own use*," and was not taxable.

The history of "the Philadelphia Gas Works," where the gas was made, and their relation to the city of Philadelphia, was this:

They originated in a city ordinance passed in 1835, and which seems to have contemplated the temporary establishment of a quasi corporation which might yet be, or be ultimately, a department of the city government. The works were to be and were constructed by means of money subscribed by private individuals, for which they received certificates of *stock* entitling them to the profits arising from the manufacture and sale of gas. The ordinance provided that the works should be under the exclusive management of trustees elected by the *councils of the city;* also that the public lamps should be supplied at half the price paid by private consumers. It provided, above all, that the city corporation should have a right to take possession on certain conditions. The original capital was limited to $100,000. The works, with the increase of the city, not being found large enough and needing to be extended, subsequent ordinances were passed authorizing loans, and providing that the money should be borrowed by the *city*, on the requisition of the trustees, and that obligations of the *city* should be issued to the loanholders. A sinking fund, as security for the loanholders, was created out of the proceeds of sale of gas before any profits were distributable to the stockholders. The interest on the certificates of loan was declared payable at the office of the gas works. In 1841, under the original ordinance of 1835, reserving to the city the right to take

possession, the city did take possession in their own right, and the stock was converted into a "gas loan," in which the city was the debtor, and whose interest was, in fact, paid at the city treasury. But the works were continued under the superintendence of the existing trustees; the only change in the relation of the trustees being that they thenceforth were trustees for the city and loanholders, instead of for the stockholders. Several ordinances were subsequently passed, authorizing further loans. They stipulated that, for the further security of the loanholders, the works should be controlled and managed by a board of trustees, elected and constituted as theretofore, who should have the whole control of the works, and of all the funds belonging to them; and that the trustees should pay no part of the funds, nor any of the profits of the works, into the city treasury, but should apply the same in payment of the interest and principal of the loans; a stipulation whose primary design was declared by the Supreme Court of Pennsylvania—on a controversy between some of the holders of the gas loans and the city corporation, which last wished to take into its own control the property, held by the trustees under the various city ordinances, out of their hands, and to elect other trustees, in addition to the number provided by the original ordinance of 1835*—to have been "to keep the pledge entirely out of the hands of the borrowers (the city), and prevent the funds from being intermingled with other property of the city, and thus exposed to the hazards of expenditure for other objects than those to which it was exclusively designated."

The gas used by the city for its public lamps was manufactured at these works; and under different ordinances, specifically providing for the price payable for gas supplied to the public lamps, a process of payment was regularly gone through with at stated intervals, though practically the matter was, in a good degree, a provision by the city

* Western Saving Fund Society v. The City of Philadelphia, 31 Pennsylvania State, 178.

for the support of works whose income paid the interest on, and provided a sinking fund for final redemption of its own "gas loans," held by various creditors.

The court below was of opinion that the gas was "made and sold," and that it was taxable.

Mr. Ashton, for the collector:

1. The case of *Insurance Company* v. *Ritchie*,* lately adjudged, decides that the jurisdiction of the Circuit Courts, in original suits between citizens of the same State, in *internal* revenue cases, conferred by the 50th section of the act of June 30th, 1864, was taken away by the 68th section of the act of July 13th, 1866, and that all original suits, pending at the passage of this last act, fell. This 68th section, however, saves (under certain conditions) "any case which may have been removed from the courts of any State, *under said 50th section.*" It saves none, removed otherwise. But the present suit was not so removed. It was removed under the act of 1833, which was assumed by the collector to extend to such cases. In fact it was removed, and once tried, months before the act having that 50th section was passed. Unless, therefore, the act of 1833 extends to cases of *internal* revenue, must not this case fall? The matter is suggested.

2. *As to the merits:* If all the loans, for the payment of which the trustees appointed by the city, primarily hold and manage the gas works, were paid off, no new ones being contracted, the works, and all right over their products, would become the city's, and the tax might not be chargeable; but at present there is a clear trust for the holders of the gas loan; and the city has to elect trustees who will manage them in subordination to their obligations to those creditors. The gas is "sold" for their benefit, and by the arrangements between the city and its creditors, it must be so sold. The decision of the Supreme Court of Pennsylvania, when the city wished to act as *owners*, concludes this case.

* *Supra*, p. 541.

Messrs. Lynd (*City Solicitor*), *W. L. Hirst, and Richard Ludlow, contra:*

1. The question of jurisdiction seems not to be much pressed. If the court below was right in taking jurisdiction under the act of 1833, as it did, the case is plain. Neither the act of 1864 nor that of 1866 has anything to do with the matter.

2. *As respects the main question:* Taxing statutes, confessedly, are to be strictly construed. Hence the manufacturers or producers of gas, subject to taxation, must be private individuals, or private corporations, who pursue the business of making gas as a source of profit.

Nowhere in the law is it provided that a *city*, or town, or state, engaged in the manufacture of taxable articles, shall pay a tax; for no city or state is known to be in the exercise of any but municipal functions—functions exercised for the public good and not for pecuniary aggrandizement. The gas used by the city of Philadelphia is made under the direction of and by an especial department of the municipal government. The trustees of her gas works are chosen at stated periods by the city councils, the legislative department of the city. The trustees are mere managers; elected by the city; having no title whatever. Really and practically the gas works are a city affair. The city owes for them and owns them. There are no stockholders, and the "payment" relied on to make the case "a sale" and to take it out of that of a person manufacturing for himself is simply a payment by one hand into another and back. The city pays the gas works and the gas works hand the payment back to the city to pay interest on *its* gas debt.

The internal revenue acts were made for the purpose of taxing the revenues and the incomes of the country. Nowhere does it appear that subsidies were to be levied upon states, or towns, or that any business but that which was clearing a profit should pay a tax. These facts are evident from the whole language and import of the acts themselves, sufficiently known to all. Land itself was not to be taxed, but its products in kind and specie. The manufacturer was

not to pay for the amount of his stock, nor for his accumulation of raw material, but for the results of his skill and labor from which he gets wealth.

Mr. Justice CLIFFORD delivered the opinion of the court.

Plaintiffs sued the defendant as the collector of internal revenue in the second collection district in the State of Pennsylvania, in an action of assumpsit for money had and received, to recover back the sum of twenty-six thousand eight hundred and seventy-five dollars and fifty-seven cents, which they had previously paid to him under protest, and which he, as such collector, had demanded of them as for internal revenue duties. Record shows that the duties were assessed for the last four months of the year 1862, and for the first six months of the succeeding year, upon illuminating gas, manufactured and furnished by the trustees of the Philadelphia Gas Works, and which was consumed under the direction of the proper authorities of the city in her public lamps during that period. Assessment of the duties in question was made under the seventy-fifth section of the act of the first of July, 1862, which provides in effect that upon illuminating gas, made wholly or in part of coal, or of any other material, and produced and sold, or manufactured, or made and sold or removed for consumption, or for delivery to others than agents of the manufacturers or producers, there shall be levied and collected a duty of five cents per one thousand cubic feet. Section thirty-three of the act of the third of March, 1863, enacts that those provisions shall also be applied to the producers of the several articles mentioned in that section as subject to duty as well as the manufacturers.*

Suit was commenced in this case in the State court, but on motion of the defendant, the same was removed, on the twenty-fifth day of November, 1863, into the Circuit Court of the United States for that district, where the verdict and

* 12 Stat. at Large, 462–729.

judgment were for the defendant. Exceptions were duly taken by the plaintiffs, and they sued out the present writ of error. Defendant objects to the jurisdiction of the court, and insists that the writ of error should be dismissed, and as that objection presents a preliminary question it will first be examined.

1. Jurisdiction of the Circuit Courts was extended by the second section of the act of the second of March, 1833, to all cases in law or equity arising under the revenue laws where other provisions had not been previously made by law. Section three of that act also provided that any officer of the United States, or other person who should be sued in any State court for or on account of any act done under the revenue laws, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer or other person under such law, might, in the manner therein prescribed, remove the cause into the Circuit Court, and that the cause so removed should be proceeded in as one originally commenced in that court.*

Those provisions were extended to cases arising under the laws for the collection of internal duties by the fifth section of the act of the thirtieth of June, 1864, and the same section enacted in effect that all persons duly authorized to assess, receive, or collect such duties or taxes under such laws, should be entitled to all the exemptions, immunities, benefits, rights, and privileges therein enumerated or conferred.†

Undoubtedly the original act was passed for the protection of officers of the revenue, and persons acting under them, charged by law with the collection of import duties, and the first proviso in the sixty-seventh section of the act of the thirtieth of July, 1866, expressly enacts that the original act shall not be so construed as to apply to cases "arising under any of the internal revenue acts, nor to any case in which the validity or interpretation of those acts shall be in issue."‡

Effect of that proviso is to limit the scope of the original act, without repealing it, to cases arising under the acts of

* 4 Stat. at Large, 632. † 13 Id. 241. ‡ 14 Id. 172, § 67.

Congress providing for the collection of import duties, and to confine its operation to the purposes for which it was originally passed, but the proviso does not touch the provision as re-enacted in the subsequent act, entitled An act to provide ways and means for the support of the government, and for other purposes. Had legislation stopped there the subsequent provision would have remained in full force, but the sixty-eighth section of the act which in its sixty-seventh section limits and restrains the original provision in the act of the second of March, 1833, repeals the fiftieth section of the act of the thirtieth of June, 1864, altogether, subject to the proviso contained in the same repealing section.*

Substance of the last-named proviso is that any case removed from the court of a State into the Circuit Court under former regulations upon the subject, shall be remanded, unless the justice of the Circuit Court shall be of opinion that the same if pending in the State court would be removable under the new provision contained in the sixty-seventh section of the same act which in its sixty-eighth section repeals the fiftieth section of the prior law.†

2. Section sixty-seven, in the body of the section preceding the proviso limiting and restraining the operations of the original act to cases arising under the laws for the levy and collection of import duties, makes provision for the removal of any case, civil or criminal, commenced against any officer appointed or acting under the law to provide internal revenue, or against any person acting under such an officer, on account of any act done in virtue of his office, &c., and prescribes the mode of proceeding to effect such a removal of the case.‡

Present case is one which was removed into the Circuit Court under the original act, now limited and restrained in its operation to cases arising under the laws for the collection of import duties, but it is undeniably one which, if pending in the State court, would be removable under the new provision, and inasmuch as it was pending in the Cir-

* 14 Stat. at Large, 172, § 68. † Ib. ‡ Id. 171, § 67.

cuit Court when the last-named proviso was passed, and has never been remanded by the justice of the Circuit Court, it must be understood as a conclusion of law that it was his opinion that it ought to be retained in the Circuit Court. Want of jurisdiction, therefore, is not shown, although the parties, plaintiffs and defendant, are citizens of the same State.

3. Cases arising under the internal revenue laws, as now modified, if commenced in a State court, against an officer appointed or acting under those laws, or against persons acting under such an officer, may be removed on petition of the defendant into the Circuit Court for the district, and the jurisdiction of the Circuit Court over such controversies, when all the prescribed conditions for the removal concur in the case, is clear beyond doubt, irrespective of the citizenship of the parties.

Although the point was not made in this case, it seems proper to remark that the jurisdiction of the Circuit Court has often been denied in this class of cases, because the party aggrieved may appeal to the commissioner for redress, and because he may also pursue his remedy by petition to Congress or present it in the Court of Claims. Suffice it to say, without entering much into the argument, that such a theory finds no substantial support in any act of Congress upon the subject or in any decided case. On the contrary, the several acts of Congress for the assessment and collection of internal duties contain many provisions wholly inconsistent with any such theory, and which, when considered together, afford an entirely satisfactory basis for the opposite conclusion.

Collectors are appointed by the President, and they were made responsible by the fifth section of the act of the first of May, 1862, both to the United States and individuals, as the case might be, for all moneys collected by their deputies, and for every omission of duty.*

Collections were required by the twenty-third section of the act to be completed within six months, and collectors

* 12 Stat. at Large, 434.

were required to render their final account and pay the sums collected into the treasury within that period. Argument is that inasmuch as collectors were required by that act to pay all moneys collected into the treasury, they cannot be held liable to refund any portion of such collections; but the same requirement is made of the commissioner, and yet he is authorized to remit, refund, and pay back all duties erroneously or illegally assessed or collected, and to pay all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses paid under protest.*

4. Necessary implication from those provisions is, that actions may be maintained against collectors of the internal revenue to recover back duties illegally or erroneously assessed. Authority is also conferred upon the commissioner, by the forty-fourth section of the act of the thirtieth of June, 1864, not only to pay back all duties erroneously or illegally assessed or collected, but also all duties that appear to be excessive in amount, *and to repay* to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them, with costs and expenses of suit.†

Same section also confers authority upon the commissioner to repay to assessors, assistant assessors, collectors, deputy collectors, and inspectors, *all damages and costs* recovered in any suit against them by reason of any act done in the performance of their official duties. Evidently, those clauses of the section contemplate different grievances and different remedies for their redress as known at common law and in the practice of the courts.‡

5. Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or

* 12 Stat. at Large, 725, 729. † 13 Id. 239. ‡ See also 14 Id. 111.

under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.*

When a party, knowing his rights, voluntarily pays duties or taxes illegally or erroneously assessed, the law will not afford him redress for the injury; but when the duties or taxes are illegally demanded, and he pays the same under protest, or gives notice to the collector that he intends to bring a suit against him to test the validity of the claim, the collector may be compelled to refund the amount illegally exacted.†

Decisions to the same effect were made in the parent country at a very early period, and like decisions are to be found in the judicial reports of all, or nearly all, of the several States. But the third section of the act of the third of March, 1865, requires collectors to pay daily into the treasury the gross amount of all duties, taxes, and revenue received or collected in virtue of the internal revenue acts, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description whatever.‡

Defendant contends that this provision has the same legal effect in respect to suits against the collectors of the internal revenue as the second section of the act of the third of March, 1839, had in respect to suits against collectors of customs.§

6. None of the internal revenue acts, however, contemplate that collectors shall reimburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and paid under protest. Direction in those acts is, without exception, that all such judgments shall be paid by the commissioner, including, by the latter acts, costs and expenses of suit.

* Elliott *v.* Swartwout, 10 Peters, 150.

† Bend *v.* Hoyt, 13 Id. 267.

‡ 13 Stat. at Large, 487.

§ 5 Stat. at Large, 348; Cary et al. *v.* Curtis, 3 Howard, 236; Curtis *v.* Fiedler, 2 Black, 461.

Clear implication of the several provisions is, that a judgment against the collector in such a case is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source. Evidently, therefore, it is not material in this inquiry whether the collectors of the internal revenue are required to account daily or monthly, or whether they are required to pay into the treasury the gross or only the net amount of collections, so long as this provision authorizing the commissioner to pay such judgments, costs, and expenses of suit, remains in full force.

Direct repeal is not pretended, and it is equally clear that the enactment requiring collectors to pay the gross amounts collected into the treasury is in no respect repugnant to the provision directing the commissioner to pay all judgments recovered against such collectors for duties illegally or erroneously assessed and paid under protest. Inconsistent provisions are repealed, but all others remain in full force.* Section nineteen of the act of the thirteenth of July, 1866, does not apply in this case, as it was not passed until long after this suit was commenced.†

Strong support to the conclusion that the Circuit Courts have jurisdiction in cases like the present is derived from the several provisions authorizing the removal of such cases from the State courts into the Circuit Courts for trial. Parties compelled to pay an illegal assessment ought to have a convenient remedy to redress the injury, and inasmuch as it is enacted by Congress that no suit for the purpose of restraining the assessment or collection of taxes shall be maintained in any court, it is believed that there is no more appropriate or effectual remedy known to the common law than the action of assumpsit for money had and received, as in this case.‡

7. All the gas consumed in the public lamps of the corporation plaintiffs, is manufactured at the Philadelphia Gas

* 13 Stat. at Large, 486, § 16.

† 14 Id. 152.

‡ Act March 2, 1867, § 10.

Works, and payment therefor is made by the corporation to the trustees of the works, as shown by the only witness examined in the case. Origin of the gas works is shown in the ordinance of the twenty-first of March, 1835, and it appears that the works were constructed and put in operation by means of money subscribed by private individuals, for which they received certificates of stock, signed by the mayor of the city, and countersigned by the treasurer, entitling the holder to the proper share of the profits arising from the manufacture and sale of gas. Original subscriptions amounted to one hundred thousand dollars, and the provision was, that the works should be under the exclusive control and management of twelve trustees, to be elected by the councils of the city. Purpose was to supply the city and the citizens with gas; but the stipulation was, that the public lamps of the city should be supplied at one-half the price paid by private consumers. Five hundred dollars is annually paid by the trustees to the city as rent of the lot for the location and use of the gas works. New subscriptions and loans were subsequently authorized to increase the capital stock for the extension of the works.

Moneys arising from the manufacture and sale of the gas were required by the original ordinance to be paid into the city treasury, but that part of the ordinance was afterwards repealed, which gave the entire control to the trustees. Whenever the municipality deemed it expedient they might take possession of the gas works and convert the stock into a loan, redeemable in twenty years. They did take possession of the works, and loan certificates, on the third day of June, 1841, were issued to the stockholders, but the stipulation that the works should be controlled and managed by the trustees elected, as before, was renewed in the subsequent ordinance, passed in the same month. Clear profits were required, under this last arrangement, to be set apart as a sinking fund to be invested in the loans to the association, and the trustees were charged with the duty of carrying the regulation into effect. Throughout, from the organization of the association to the commencement of the suit,

the works have been controlled and managed by the trustees, and the interest of the association, which constructed the works and put them in operation, has never been divested or become vested in the corporation.

Plaintiffs authorized the mayor of the city, on the sixteenth day of February, 1856, to contract with the trustees for the lighting, extinguishing, cleansing, and repairs of the public lamps of the city, for the term of three years, at a stipulated sum for each lamp, and made a sufficient appropriation to carry the contract into effect; and the evidence showed that the works were, throughout the period for which the duties were assessed, in the exclusive possession of the trustees. Testimony also showed that the city paid monthly for the gas consumed in her public lamps throughout that entire period. They sometimes paid a fixed sum for each lamp and sometimes one-half the rate paid by private consumers.

Prayers for instruction were presented by both parties, but the presiding justice rejected them all, and instructed the jury that the plaintiffs were not entitled to recover, and that their verdict should be for the defendant.

8. Buried as the original transaction is in subsequent ordinances and amendments thereto, still it is believed that there is no great difficulty in ascertaining the true state of the case so far as it respects the present controversy. Trustees elected by the councils of the city superintended the construction of the works, but the subscribers to the capital stock furnished the money employed in the enterprise, and became and are the legal owners of the works. When loans were subsequently made to enable the association to supply gas to a larger portion of the citizens, the capital stock and the number of shares were increased, but the control and management remained unchanged. Debts contracted by loans or otherwise became liens upon the works, and, in some instances, the faith of the city as surety or guarantor was pledged for the payment of the interest and ultimate payment of the principal. Such liens did not change the ownership of the capital stock of the association, nor did

the mere entry by the city for the purpose of laying the foundation to issue the loan certificates, as the possession was only temporary, and the control and management were, by new stipulation, continued in the trustees constituted and appointed in case of any vacancy, as provided in the original ordinance. Rent was paid, as before, to the city for the lot leased for the location of the works and for the use of the association, and the authorities continued, as before, to pay monthly or otherwise, at stipulated prices, for the gas consumed in the public lamps.

Taking the facts *as they appear in this record*, it is clear that the property of the association never became vested in the city, and it is equally clear that it remained vested in the association, subject to the liens created as security for the loans and as indemnity to the city for her liabilities incurred as surety or guarantor. Supreme Court of the State regarded the city as the borrower in the matter of the last loan, and they held that the object of the stipulation that the works should continue to be controlled and managed by a board of trustees, elected as before, was to keep the pledge out of the hands of the borrower and prevent the fund from being mingled with the funds of the city. Ruling of the court that the works were held by the city in pledge *only*, and not in full property, is all which the present case requires this court to decide. They also held that the effect of taking possession and the issuing of the certificates of loans, was, that the trustees ceased to be trustees for the stockholders and became the trustees of the city and the loanholders.*

Suppose that to be so, still they held that the control and management of the works continued in the trustees, and that they were to be elected, as under the original ordinance. Rights of the stockholders could not be divested without their consent, and the mere acceptance of certificates of loan in the place of certificates of shares in the capital stock, *without more*, would not operate to convey to the

* Saving Fund Co. *v.* City of Philadelphia, 7 Casey, 187.

city their interests in the gas works. Conclusion is, that the duties were properly assessed, and that there is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

THE KANSAS INDIANS.

1. The State of Kansas has no right to tax lands held in severalty by individual Indians of the Shawnee, Miami, and Wea tribes, under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the 11th section of the act of June 30th, 1859 (11 Stat. at Large, p. 431).
2. If the tribal organization of Indian bands is recognized by the political department of the National government as existing; that is to say, if the National government makes treaties with, and has its Indian agent among them, paying annuities, and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites,—in the midst of whom, by the advance of civilization, they have come to find themselves,—does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are, and subject to its laws.
3. Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from "levy, sale, and forfeiture," is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also, for non-payment of taxes.

THESE were three distinct cases involving, however, with certain differences, essentially the same question, argued on the same day and by the same counsel.

The specific question was, whether the State of Kansas had a right to tax lands in that State held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes, under patents issued to them pursuant to certain treaties of the United States; the tribal organization of these tribes having to a certain extent, as was alleged, been broken in upon by their intercourse with the whites, in the midst of