INSURANCE COMPANY *v.* THE TREASURER.

1. A State statute directed a county treasurer to give certificates of indebtedness to any bank in the county for the amount of tax paid on its investments in the public indebtedness of the United States, "which taxes have been judicially decided to have been illegally imposed and collected." To an alternative mandamus to compel the treasurer to give such certificates, he answered that it had *not been judicially decided* that the particular tax was illegal. A peremptory mandamus was refused by the State court. *Held*, that, although this court had since decided the tax to be illegal, yet, as it did not appear by the record that the State court passed on the legality or illegality of the tax, but might have decided the case on the construction of the State statute, this court had no jurisdiction to review the decision of the State court.
2. In order to give this court jurisdiction by writ of error under the 25th section of the Judiciary Act, it must appear, by the record, that a Federal question was raised.

THIS case was brought before the court upon a writ of error to the Supreme Court of the State of New York, under the 25th section of the Judiciary Act, or rather under the act of February 5, 1867, which has been substituted for that section.

The Phœnix Insurance Company, the plaintiff in error, was a corporation of the State of New York, doing business in Brooklyn, King's County, and was assessed for the taxes of 1863 and 1864 upon its investments in United States "certificates of indebtedness," issued pursuant to the acts of Congress, passed March 1st and 17th, 1862.* These taxes amounted to over $3000, and were paid into the county treasurer's office of King's County in December, 1863, and November, 1864. They were levied under an act of the legislature of the State of New York, passed April 29, 1863, making all banks and other moneyed corporations liable to taxation on a valuation equal to the amount of their capital stock paid in and their surplus earnings (less 10 per cent. of such surplus). Under this law authority was claimed by the State officers to include in that valuation the invest-

* 12 Stat. at Large, 352, 370.

Statement of the case.

ments made by those companies in the public indebtedness of the United States, including the National bonds or stocks, certificates of indebtedness, and all other National securities. This tax, so far as it was laid on a valuation which embraced the government *bonds or stocks*, was confessedly adjudged illegal by this court in the *Bank Tax Case*, reported in 2d Wallace, 200, which was decided in the Term of December, 1864. And as the insurance company assumed, it was also adjudged illegal in that same case, so far as it was laid on a valuation which embraced certificates of indebtedness; a position which they attempted to maintain by a reference to the original records of this court, in certain of the numerous cases which came up, and were adjudged under the general title above given of *The Bank Tax Cases*. But if the cases then brought before the court embraced certificates of indebtedness, as well as government bonds, the attention of the court was not specially directed to that fact, and the opinion does not notice it.

After this decision the legislature of New York, on the 6th of April, 1866, passed an act, as follows:

"SECTION 1. The board of supervisors of the County of Kings are authorized and directed to levy and collect by tax . . . the several sums paid in said county, by the several incorporated companies in said county, in the years 1863 and 1864, for taxes assessed on their investments in the public indebtedness of the United States, with interest thereon, *and which taxes have been judicially decided to have been illegally imposed and collected.*"

A subsequent section directed the treasurer to refund those taxes to said companies out of said moneys, requiring him, in the meantime, to issue county certificates of indebtedness for the respective amounts on receiving a certified copy of the act.

The Phœnix Insurance Company, on the 12th of May, 1866, demanded of the county treasurer (who had received a copy of the act) the county certificate of indebtedness to which, it was supposed, the act entitled it. The treasurer declined to give it. Thereupon the company sued out of

the State Supreme Court an alternative mandamus, calling on the treasurer to show cause for such refusal. His answer to the writ was that taxes on "certificates of indebtedness" *had not been judicially decided to have been illegally imposed or collected*, and, therefore, that the case was not within the purview of the act, and he had no authority to issue the certificates. He did not attempt to deny that the tax was illegal, but insisted that it had not been judicially declared illegal. This answer was filed December 3, 1866, before the decision of this court in the case of *The Banks* v. *The Mayor*,* in which the court did without doubt, decide that the "certificates of indebtedness" of the government were exempt from taxation.

Upon this alternative mandamus and the answer thereto the case went up to the Supreme Court and the Court of Appeals, which concurred in refusing to issue a peremptory mandamus. The opinion of the Supreme Court, of which counsel exhibited a short report, placed the case upon the ground that these "certificates of indebtedness" were not exempt from taxation. But no opinion of the Court of Appeals appeared in any record of the case.

The purpose of the writ of error was to have a review of the judgment by the Court of Appeals.

Mr. A. C. Bradley, with whom was Mr. E. C. Benedict, argued for the plaintiff in error:

A question of jurisdiction may suggest itself. But the case made in the writ called in question the validity of the authority of the State of New York to tax the United States certificates of the indebtedness owned by the insurance company—whereby those taxes were illegally collected, and therefore the company was entitled to have, and it was the county treasurer's duty to issue the certificates of county debt demanded. The State court, by denying the peremptory writ and giving absolute judgment for the defendant, in effect decided that the authority so questioned was valid

* 7 Wallace, 16.

and the tax legal, and that the company was not entitled to receive, nor was the treasurer bound to issue to it the certificates demanded. The case is not distinguishable from *The Bank Tax Cases*, or from *The Banks* v. *The Mayor*. The alleged invalidity in those cases was the same as in this, and the decision by the State court is as emphatic in favor of the validity in the present case as in the others.

In truth, the record in the present case presents no question, but whether certificates of indebtedness were or were not illegally taxed in the State of New York in the years 1863 and 1864; the affirmative being maintained by the insurance company, denied by the county treasurer, and the State courts having decided in favor of the latter.

2. As to the merits. That certificates of indebtedness issued by the government of the United States were not taxable, was adjudged by this court, as we apprehend, in both of the cases cited above, certainly in the last. The matter is, therefore, *res adjudicata*.

3. The case made by the insurance company was within the spirit and letter of the act of April 6, 1866, passed by the State of New York.

The last clause of the first section, "*and which taxes have been judicially decided to have been illegally imposed and collected*," is not a condition or proviso, limiting the extent of the earlier provisions, but is a statement of the reason why the act was passed, and why restitution had become a duty. Such matter is ordinarily either omitted or else inserted in the preamble; but it has here crept on to the end of a section, and appears as an adjectitious thought. It has no effect there which it would not have had if it had been inserted in a preamble or omitted altogether. In either case it would have been the duty of the board of supervisors to raise by tax the sums paid by the incorporated companies for taxes on their investments in the public indebtedness of the United States, and it would have been the county treasurer's duty, out of the moneys so raised, to refund those taxes, and as a voucher for the claim, to issue the certificates. Those taxes would have been equally illegal whether there had or had not been

any judicial decision on the subject, or whether such decision, having been in fact made, it was mentioned in the preamble, or in the body of the act, or not mentioned at all. In the statute relative to the city of New York, passed at the same session, no judicial decision was referred to. But this court, in *The Banks* v. *The Mayor*, held the taxes, nevertheless, illegal.

4. The return stated no defence to the writ.

Mr. P. H. Crooke, opposing counsel, was stopped by the court.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The Supreme Court and the Court of Appeals concurred in refusing to issue a peremptory mandamus. The opinion of the Supreme Court is before us, and places the case upon the ground that these "certificates of indebtedness" were not exempt from taxation. But no opinion of the Court of Appeals seems to have been written. At least none appears; and we cannot tell on what ground that court placed its decision. And, indeed, it ought to appear from the record, and not from any opinion of the court, that a Federal question was raised in order to give this court jurisdiction of the case. For all that appears from the record, the decision of the Court of Appeals may have been passed simply on its construction of the State statute. It may have been placed on the ground that that statute only applied to cases "in which the taxes had been judicially decided to have been illegally imposed and collected," and that up to that time the taxation of certificates of indebtedness had not been judicially decided to be illegal. If it were placed on this ground—and, so far as the record goes, *non constat* that it was not—that would have been a decision of the case upon a construction of the State act of 1866. Now, we have repeatedly held that the construction of State statutes belongs to the State courts, and is not a Federal question which we can revise in a writ of error to a State court. It is true, if the State court gives such a construction to a State statute

as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a Federal question is raised, and we can review the decision on the point of the validity of the statute. But in this case it does not appear what construction was given to the State statute. All that can certainly be gathered from the record is, that the State statute, in the opinion of the Court of Appeals, did not oblige the county treasurer to issue county certificates to the plaintiffs in this particular case. For aught that appears, the court may have regarded the statute as only furnishing a remedy for cases expressly adjudicated upon. Such a construction of the statute is not without plausibility, and was insisted upon by the treasurer in his answer to the alternative writ.

Had the State courts decided against the *right* of the plaintiffs, and had it so appeared by the record, the jurisdiction of this court would have attached to the case. But that does not appear. It only appears that they have decided that the plaintiff has no *remedy* under this statute. Its right to recover the illegal tax is undisputed, but not to recover it in this way.

We are referred to the case of *The Banks* v. *The Mayor*,* where it was decided, under another act of the New York legislature, that a mandamus in a somewhat similar case was wrongfully withheld. It appears that a few days after the passage of the act relating to King's County, on which the present case arises, the legislature passed a like act relating to the city of New York, but without the descriptive words, relating to a judicial decision, which are relied on in this case. A mandamus to compel the issue of city bonds for the amount of the illegal taxes was applied for and refused. But that case was placed, both in the State courts and in this court, solely on the ground of the legality of the tax. No question respecting the construction of the State

* 7 Wallace, 16.

statute was raised, either by the record or the argument. Being satisfied, in that case, that the tax was illegal, and that the mandamus ought to have been granted, we felt bound to reverse the judgment of the State court; and nothing in the present opinion is intended to call that decision in question.

The writ of error in this case must be

DISMISSED.

INSURANCE COMPANY v. FRANCIS.

An averment in a declaration that the defendant is a corporation created by an act of the legislature of the State of New York, located in Aberdeen, Mississippi, and doing business there under the laws of the State, is not an averment that the defendant is a citizen of Mississippi.

THIS cause came up by writ of error to the District Court of the United States for the Southern District of Mississippi.

It came into the said District Court in this wise:

One Francis had brought suit in the Circuit Court of Monroe County, Mississippi, November Term, 1866, against "The Germania Fire Insurance Company of the City of New York," upon a policy of insurance. The company appeared to the suit, and demurred to the declaration. The plaintiff, at August Term, 1867, petitioned for the removal of the cause "to the Circuit Court of the United States, held in or at Oxford, in the Northern District" of Mississippi, averring that the petitioner, the plaintiff, is a citizen of Illinois, and "*that said defendant is a corporation with agents and officers in said State of Mississippi here residing and transacting the business of insurance for which said company was incorporated.*" And thereupon the judge of the Circuit Court of Monroe County ordered "that the case be removed from that court to the District Court of the United States for the Northern District of Mississippi, as prayed for."

This removal was made in pursuance of a statute of March