COMMENT.

The question whether a corporation can be an "inhabitant" of any State other than that of its creation was discussed in *United States* v. *Southern Pacific R. R. Co. et al.*, 491 Fed. Rep. 297. The United States brought a bill in equity in the Northern District of California against the Southern Pacific R. R. and others; a motion was made to dismiss on the ground that the act of March 3, 1887, defining the jurisdiction of the Circuit Courts of the United States requires that wherever the suit is not founded on diverse citizenship original process must be served upon the defendant in the district of which he is an "inhabitant"; and that the Southern Pacific Co., one of the defendants to the bill, was a corporation of Kentucky, and could not therefore be an "inhabitant" of California within the meaning of the statute, although it had agents there to accept process. Mr. Justice Harlan, sitting at circuit decided the case as follows: "The Court is of the opinion that the clause in the first section of the act of 1887, requiring suits to be brought in the district of the residence either of the plaintiff or of the defendant where jurisdiction is founded only on diversity of citizenship, applies only to suits in which the parties, whether natural or artificial persons, are 'citizens of different States,' and cannot apply to suits brought by the United States." * * * "The question therefore, to be determined is whether a corporation created by the laws of another State, but doing business here, and having its agents located within the territorial jurisdiction of this Court, may not, within the meaning of the statute, be deemed an 'inhabitant' of this State and district. Numerous cases have been cited by the counsel of defendants as showing that a corporation of one State is an inhabitant only of the State creating it. Upon a careful examination of those cases, the Court is of opinion that no one of them determines the precise question now before it. The cases cited in argument establish these principles: 1. While a corporation is domiciled in the State by whose laws it was created, its legal existence in that State may be recognized elsewhere; so that, within the scope of its limited powers, it may make and enforce contracts in other States which are not forbidden by the

laws of such States. * * * 2. For the purposes of jurisdiction in the courts of the United States, a corporation is to be deemed a citizen of the State creating it, and no averment to the contrary is permitted. * * * 3. A corporation of one State, by engaging in business or acquiring property in another State, does not thereby cease to be a citizen of the State creating it (*Insurance Co.* v. *Francis*, 11 Wall. 210); although while the act of 1875 was in force, it could be 'found' in any State where it did business regularly by its agents, process being served upon such agents. * * * In some of the cases cited there are general expressions upon which much stress is laid by counsel. * * Those cases undoubtedly hold that a corporation cannot throw off its allegiance or responsibility to the State which gave it existence, and that its primary, legal domicile or habitation,—that is, its citizenship,—is in such State; consequently, for the purposes of suing and being sued in the Courts of the United States, it is to be deemed a citizen of the State by whose laws it was made an artificial person. But neither those cases, nor any case in the Supreme Court of the United States, directly decides that a corporation may not, in addition to its primary, legal habitation or home in the State of its creation, acquire a habitation in, or become an inhabitant of, another State, for purposes of business, and of jurisdiction *in personam*. It is eminently just that the defendants, not corporations of this State, should be regarded as inhabitants of this district for purposes of jurisdiction. Each of them is under a duty, imposed by the Constitution of this State, to have and maintain an office or place here for the transaction of its business. * * * If it be said that inhabitancy in a State, in its strict legal sense, implies a permanent, fixed residence in that State, the answer is that a corporation of one State, operating, by agents, a railroad or telegraph line in another State, with its consent, or under its license, may be regarded as permanently identified with the business and people of the latter State, and, for the purposes of its business there, to have a fixed residence within its limits. * * * It seems to the Court that a corporation of a State, or a corporation of the United States, holding such close relations with the business and people of another State, may, within a reasonable interpretation of the act of 1887, be deemed an 'inhabitant' of the latter State for all purposes of jurisdiction *in personam* by the courts held there; although a corporation is, and, while its corporate existence lasts, must remain, a 'citizen' only of the State which gave it life." In a succeeding case decided in the Circuit Court of Oregon the same way (*Gilbert* v.

New Zealand Ins. Co., 49 Fed. Rep. 885), Deady, District Judge, refers to 38 Fed. Rep. 273, 40 Fed. Rep. 1, and 42 Fed. Rep. 465. as opposed to the doctrine of this case.

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The Supreme Court of the United States has of late made some very fine distinctions upon the never ending question of "What amounts to a regulation of Inter-State Commerce?" In *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, which was noticed in the February number of the JOURNAL, the difference between directly taxing gross receipts and levying a tax based upon the gross receipts of a previous year was the turning point of the decision. Now comes *Ficklen* v. *Shelby County Taxing District*, decided last April and reported in 145 U. S. 1, and nearly runs afoul the leading case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. This latter will be remembered as the "Drummer's Tax Case," where it was held that a law authorizing a license tax upon drummers was unconstitutional so far as it applied to drummers selling for firms located in other States, because it was in effect a tax, not upon the drummers, but upon the houses which they represented, and hence attempted to regulate inter-State commerce. In the Ficklen case, however, the question arose as to the constitutionality of this same law so far as it authorized a tax upon the commissions of a commission broker living in Memphis, but doing business only for parties living outside of Tennessee. The court, with the exception of Mr. Justice Harlan, upheld the law on the ground that if the tax did affect inter-State commerce, it was so remotely and incidentally as not to amount to a regulation of such commerce, and that the tax was really upon the property of the broker. The Chief Justice said in the course of the opinion: "No doubt can be entertained of the right of a State legislature to tax trades, professions and occupations, in the absence of inhibition in the State constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of inter-State commerce, forbidden by the Constitution. * * * We presume it would not be doubted that, if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection, but because they had no capital invested, the tax was ascertained by reference to the

amount of their commissions, *which, when received were no less their property than their capital would have been.*" [The italics are ours.—EDS.] We feel curious to know how the court would regard a law authorizing a tax not in the nature of a license, but based directly upon the sales made by a drummer.

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Where a board of county commissioners entered into negotiations for the purchase of a toll road and a majority of the county electors approved of such purchase at a special election, but the board afterwards refused to complete the purchase of the road, the Supreme Court of Indiana has held that *mandamus* will not lie at the instance of the road company to compel the board to make an order for such purpose, since the board acts judicially in investigating and passing upon the title of the company to the road which is the subject of purchase, and in determining that sufficient steps have been taken to authorize it to complete such purchase. The vote of the electors did not dispense with such further action of the board, and when acting in such judicial capacity a court will not by writ of *mandamus* compel a board of commissioners to perform a judicial duty in any particular mode, or to render any particular judgment. (*State ex. rel. Dayton Gravel Road Co.* v. *Commissioners*, 30 N. E. Rep. 892).