HORNBOOK CASE SERIES

# ILLUSTRATIVE CASES

ON

# CONSTITUTIONAL LAW

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A COMPANION BOOK
TO
BLACK ON CONSTITUTIONAL LAW (3d Ed.)

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# THE HORNBOOK CASE SERIES

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ON

# CONSTITUTIONAL LAW

## AMENDMENT OF STATE CONSTITUTIONS [1]

### KOEHLER v. HILL.

(Supreme Court of Iowa, 1883. 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609.)

[Appeal from Scott County District Court. The Constitution of Iowa provided that proposed amendments thereto should be agreed to by two successive sessions of the General Assembly and then submitted to the people for ratification, and should become a part of the Constitution when approved by a majority of the qualified electors voting thereon. A proposed amendment, which purported to have been agreed to by the Eighteenth General Assembly, appeared enrolled and signed as follows: "No person shall manufacture for sale, or sell, or keep for sale, as a beverage, any intoxicating liquor whatever, including ale, wine, and beer." This proposed amendment was also agreed to by the Nineteenth General Assembly and was ratified by a majority of 30,000 of the electors. It appeared from the journals of the senate of the Eighteenth General Assembly that the resolution actually agreed to by that body contained the words "or to be used" after the word "beverage," though the enrolled resolution signed by the president of the senate omitted these words. In an action by plaintiffs to recover for beer sold and delivered to defendant, it was held that the senate journals might be examined to contradict the enrolled resolution, and that the proposed amendment never legally became a part of the Constitution. The defendant appealed, and the state Supreme Court affirmed the decision (Beck, J., dissenting). On a petition for rehearing the following opinion was given:]

DAY, C. J. * * * It is asserted in the petition for rehearing

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 28, 29.

that "the judicial department of the state has no jurisdiction over political questions, and cannot review the action of the Nineteenth General Assembly, and of the people, in the matter of the adoption or amendment of the Constitution of the state." This position practically amounts to this: that the provisions of the Constitution for its own amendment are simply directory, and may be disregarded with impunity; for it is idle to say that these requirements of the Constitution must be observed, if the departments charged with their observance are the sole judges as to whether or not they have been complied with. This proposition was advanced for the first time upon the petition for rehearing, and, if correct, it is of course an end of the controversy. Upon this branch of the case counsel cite Luther v. Borden, 7 How. 1, 12 L. Ed. 581. As this case has principally been relied upon by the advocates of the theory now under consideration, and has been given great prominence in the discussions which have taken place, we desire to present its facts with a degree of fullness which, under ordinary circumstances, would perhaps be considered unnecessary, to the end that the degree of its applicability to the present case may be fully understood.

In 1841, the state of Rhode Island was acting under the form of government established by the charter of Charles II in 1663. In this form of government no mode of proceeding was pointed out by which amendments could be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders. In 1841, meetings were held and associations were formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election of a convention to form a new Constitution, to be submitted to the people for their adoption or rejection. The persons chosen came together and framed a Constitution by which the right of suffrage was extended to every male citizen of twenty-one years of age who had resided in the state for one year. Upon a return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the state, and was the paramount law and Constitution of Rhode Island. The charter government did not admit the validity of the proceedings nor acquiesce in them. On the contrary, in January, 1842, when this new Constitution was communicated to the governor and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that Constitution upon the state, to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large, and that it would maintain its authority and defend the legal and constitutional rights of the people. Thomas W. Dorr, who had been elected governor under the new Constitution, prepared to assert the authority of that government by force, and many citizens

assembled in arms to support him. The charter government thereupon passed an act declaring the state under martial law, and at the same time proceeded to call out the militia to repel the threatened attack, and to subdue those who were engaged in it. The plaintiff, Luther, was engaged in supporting the new government, and, in order to arrest him, his house was broken and entered by the defendants, who were enrolled in the military force of the old government, and in arms to support its authority. The government under the new Constitution had but a short and ignoble existence. In May, 1842, Dorr made an unsuccessful attempt, at the head of a military force, to get possession of the state arsenal at Providence, which was repulsed. In June following, an assemblage of some hundreds of armed men, under his command at Chepatchet, dispersed, upon the approach of the troops of the old government, and no further effort was made to establish the new government. In January, 1842, the charter government took measures to call a convention to revise the existing form of government, and a new Constitution was formed, which was ratified by the people, and went into operation in May, 1843, at which time the old government formally surrendered all its powers. Under this government Dorr was tried for treason, and in June, 1844, was sentenced to imprisonment for life. In October, 1842, Luther brought an action in the Circuit Court of the United States, against Borden and others, to recover damages for the breaking and entering of his house in June, 1842. The defendants justified, alleging that there was an insurrection to overthrow the government, that martial law was declared, that plaintiff was aiding and abetting the insurrection, that defendants were enrolled in the militia force of the state and were ordered to arrest the plaintiff. The plaintiff relied upon the fact that the Dorr government, to which he adhered, was the legal government of the state, and, as the new Constitution had never been recognized by any department of the old government, he offered to prove at the trial, by the production of the original ballots, and the original registers of the persons voting, and by the testimony of the persons voting, and by the Constitution itself, and by the census of the United States for the year 1840, that the Dorr Constitution was ratified by a large majority of the male people of the state, of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the state. The Circuit Court rejected the evidence, and instructed the jury that the charter government, and laws under which the defendants acted, were, at the time the trespass was alleged to have been committed, in full force and effect, and constituted a justification of the acts of the defendants. The correctness of this ruling involved the only question, which was taken to the Supreme Court of the United States for

review. The Supreme Court held that the evidence was properly rejected. Of the correctness of that decision no one can entertain the shadow of a doubt. But the differences between that case and this are so many and so evident as to deprive it of all force as an authority in the present controversy. In that case an entire change in the form of government was undertaken; in this, simply an amendment, in no manner affecting the judicial authority of those acting under the existing government, is sought to be incorporated into the existing Constitution. In that case the charter provided no means for its amendment; in this, the mode of an amendment is specifically provided. In that case the authority of the court was invoked for the admission of oral evidence to overthrow the existing government and establish a new one in its place; in this, that authority is invoked simply to preserve the existing Constitution intact.

It is evident, from an examination of the entire case of Luther v. Borden, that the question which the court was considering pertained to the power of the federal courts to determine between rival constitutions in the states. The power is not denied to the state courts, unless one of the constitutions involved in the controversy be the one under which the court is organized. This is fully apparent from the whole opinion. * * *

The language of the court which, it is claimed, asserts the doctrine that the question of a change of Constitutions is a political one, with which courts have nothing to do, was clearly employed with reference to the peculiar facts of the case. This is apparent from the following language of the opinion, which is found upon pages 39, 40: "Indeed, we do not see how the question could be tried and judicially decided in the state court. Judicial power presupposes an established government, capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived, and if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it, and if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and the authority of the government under which it is exercising judicial power." That this reasoning is eminently sound no one can doubt. A court which, under the circumstances named, should enter upon an inquiry as to the existence of the Constitution under which it was acting, would be like a man trying to prove his

personal existence, and would be obliged to assume the very point in dispute, before taking the first step in the argument. It is apparent that the reasoning employed in that case can have no application whatever to an amendment to a constitution, which does not affect the form of government, or the judicial powers of existing courts. The case of Luther v. Borden gives no countenance whatever to the doctrine that the sovereignty of the people extends rightfully to the overturning of Constitutions and the adoption of new ones, without regard to the forms of existing provisions. It is true that right, under our form of government, exists, but it is a revolutionary and not a constitutional right. When that right is invoked, a question arises which is above the Constitution, and above the courts, and which contending factions can alone determine by appeal to the dernier resort. In such a case as that, might makes right. That there are questions of such a character as to admit of no adjustment but through an appeal to arms, we freely admit. This arises out of the imperfections of human government. A government which could provide for the peaceful adjustment of all questions would be more than human. But surely no sagacious statesman or wise jurist will seek, by a narrow construction of judicial power, to extend the questions which are beyond the domain of the courts, and capable of solution only by an appeal to arms. Happily for the permanency and security of our institutions, the present case, as we believe, involves no such question.

It has been said that changes in the Constitution may be introduced in disregard of its provisions; that, if the majority of the people desire a change, the majority must be respected, no matter how the change may be effected, and that the change, if revolution, is peaceful revolution. But the revolution is peaceful only upon the assumption that the party opposed surrenders its opposition and voluntarily acquiesces. If it objects to the change, then a question arises which can be determined only in one of two methods, by the arbitrament of the courts, or by the arbitrament of the sword. * * *

Counsel have drawn an appalling picture of the wreck in which our political institutions would be involved, if the courts should conclude to decide that the Constitution of 1857, under which they are organized, had not been properly adopted. The courts of this state possess no such power, and they could not assume such a jurisdiction. The reason why a court could not enter upon the determination as to the validity of a Constitution under which it is itself organized, is forcibly set forth in the case of Luther v. Borden, supra, upon which appellant relies. The distinction between such a case and one involving merely an amendment, not in any manner pertaining to the judicial authority, must at once be ap-

parent to the legal mind. The authorities recognize the distinction. We are at a loss to know why appellant's counsel ignore and disregard it.

Appellant's counsel cite and rely upon section 2, article 1, of the Constitution of the state. This section is a portion of the Bill of Rights, and is as follows: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require." Abstractly considered, there can be no doubt of the correctness of the propositions embraced in this section. These principles are older than Constitutions, and older than governments. The people did not derive the rights referred to from the Constitution, and, in their nature, they are such that the people cannot surrender them. The people would have retained them if they had not been specifically recognized in the Constitution. But let us consider how these rights are to be exercised in an organized government. The people of this state have adopted a Constitution which specifically designates the modes for its own amendment. But this section declares the people have the right at all times to alter or reform the government, whenever the public good may require it. If the people unanimously agree respecting an alteration in the government, there could be no trouble, for there would be no one to object. Suppose, however, a part of the people conclude that the public good requires an alteration or reformation in the government, and they set about the adoption of a new Constitution, in a manner not authorized in the old one. Suppose, also, as would most likely prove to be the case, that a part of the people are content with the existing government, and will not consent to the change, and that the governor, who, under the Constitution, is the "commander-in-chief of the militia, the army and navy of the state," determines to maintain the existing government by force. It is evident that the people who think the public good requires a change, can establish these changes only by superior force. If they are powerful enough to succeed, well. They will have altered or reformed the government. But if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors. They have the right to alter their government, in a manner not recognized in the Constitution, only when they can maintain that right by superior force. It follows, then, after all, that the much boasted right claimed under this action, is simply the right to alter the government in the manner prescribed in the existing Constitution, or the right of revolution, which is a right to be exercised, not under the Constitution, but in disregard and independently of it. * * *

[Quoting from Cooley, Constitutional Limitations, p. 30:] "In the original states, and all others subsequently admitted to the Union, the power to amend or revise their Constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all state authority, have power to control and alter the law which they have made at their will. But the people in the legal sense must be understood to be those who, by the existing Constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will, in the absence of any provision for amendment or revision contained in the Constitution itself."[2] * * *

[The court here discusses Collier v. Frierson, 24 Ala. 108; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; State v. Swift, 69 Ind. 505; Westinghausen v. People, 44 Mich. 265, 6 N. W. 641; Prohibitory Amendment Cases, 24 Kan. 700; State ex rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785; and Trustees v. McIver, 72 N. C. 76.]

It is true that in the last five cases the question of jurisdiction was not raised by counsel. But the courts could not have entered upon an examination of the cases without first determining in favor of their jurisdiction. If they entertained doubts respecting their jurisdiction, it was the duty of the courts to raise the question themselves. We have then seven states, Alabama, Missouri, Kansas, Michigan, North Carolina, Wisconsin, and Indiana, in which the jurisdiction of the courts over the adoption of an amendment to a Constitution has been recognized and asserted. In no decision, either state or federal, has this jurisdiction been denied. We may securely rest our jurisdiction upon the authority of these cases. * * * Petition overruled.

[BECK, J., gave a dissenting opinion.]

[2] "There is underlying our whole system of American government a principle of acknowledged right in the people to change their Constitutions, except where especially prohibited in a Constitution itself, in all cases and at all times, whether there is a way provided in their Constitution or not, by the interposition of the legislature, and the calling of a convention, as was done in the case in hand. The offspring of revolution originally, but restrained and modified by the necessity arising out of the new principle established in this country, by the accomplishment of our national independence, that the people are the government, and not the king, and the source of

# CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS [1]

## MARBURY v. MADISON.

(Supreme Court of United States, 1803. 1 Cranch, 137, 2 L. Ed. 60.)

[Original mandamus proceeding. William Marbury and others moved for a rule to James Madison, Secretary of State, to show cause why a mandamus should not issue commanding the delivery to applicants of their commissions as justices of the peace of the District of Columbia, which had been previously signed by President Adams just before the expiration of his term of office. The Judiciary Act of 1789 authorized the Supreme Court "to issue writs of mandamus * * * to any courts appointed or persons holding office under the authority of the United States." After deciding that the applicants had a legal right to the commissions, that mandamus was a proper remedy, but that the power to issue it was not within the original jurisdiction of the Supreme Court, under article III, § 2, par. 2, of the Constitution, the court proceeded as follows:]

Mr. Chief Justice MARSHALL. * * * The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be fre-

all political power,—it has become legitimated, and without mention in our Constitutions, is as much the law of the land as if specifically set out in them; and that as a solemn recognition of this, and not as a revolutionary right, the section of the Declaration of Rights in our own, and similar clauses in other state Constitutions, were inserted." Wood's Appeal, 75 Pa. 59, 65, 66 (1874), by Stowe, J.

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 30–32, 39, 41–43.

quently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject. If an act of the legislature repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If

two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient, in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only

see the law? The Constitution declares "that no bill of attainder or ex post facto law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve? "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

Rule discharged.

## SHARPLESS v. MAYOR OF PHILADELPHIA.

(Supreme Court of Pennsylvania, 1853. 21 Pa. 147, 59 Am. Dec. 759.)

[Original bill in equity. Acting under authority of a Pennsylvania statute, defendants, officials of the city of Philadelphia, were about to subscribe for $1,000,000 of the stock of two railway companies, paying therefor in city bonds, in order to secure the construction of certain lines of railroad that would connect Philadelphia with other parts of the state. Plaintiffs, residents and owners of real and personal property in the city that would be subject to taxation for the payment of said bonds, sought to enjoin said proposed subscription as one not validly authorized under the state Constitution.]

BLACK, C. J. * * * It is important, first of all, to settle the rule of interpretation. This can be best done by a slight reference to the origin of our political system. In the beginning the people held in their own hands all the power of an absolute government. The transcendant powers of Parliament devolved on them by the Revolution. Bonaparte v. Camden & A. R. Co., 1 Bald. 220, Fed. Cas. No. 1,617; Johnson v. McIntosh, 8 Wheat. 584, 5 L. Ed. 681; Wilkinson v. Leland, 2 Pet. 656, 7 L. Ed. 542. Antecedent to the adoption of the federal Constitution, the power of the states was supreme and unlimited. Farmers' & Mechanics' Bank v. Smith, 3 Serg. & R. 68. If the people of Pennsylvania had given all the authority which they themselves possessed to a single person, they would have created a despotism as absolute in its control over life, liberty, and property as that of the Russian autocrat. But they delegated a portion of it to the United States, specifying what they gave, and withholding the rest. The powers not given to the government of the Union were bestowed on the government of the state, with certain limitations and exceptions, expressly set down in the state Constitution. The federal Constitution confers powers particularly enumerated; that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The federal government can do nothing but what is authorized expressly or by clear implication; the state may do whatever is not prohibited.

The powers bestowed on the state government were distributed by the Constitution to the three great departments: the legislative, the executive, and the judicial. The power to make laws was granted in section 1 of article 1, by the following words: "The legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representa-

tives." It is plain that the force of these general words, if there had been nothing elsewhere to qualify them, would have given to the Assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British Parliament. But the absolute power of the people themselves had been previously limited by the federal Constitution, and they could not bestow on the legislature authority which had already been given to Congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the Assembly was still further confined by that part of the Constitution called the "Declaration of Rights," which, in twenty-five sections, carefully enumerates the reserved rights of the people, and closes by declaring that "everything in this article is excepted out of the general powers of the government, and shall remain for ever inviolate." The General Assembly cannot, therefore, pass any law to conflict with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the Constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

But beyond this there lies a vast field of power, granted to the legislature by the general words of the Constitution, and not reserved, prohibited, or given away to others. Of this field the General Assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion. The reservation of some powers does not imply a restriction on the exercises of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute are strengthened by exceptions, and weakened by enumeration. To me, it is as plain that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own, or by the federal Constitution, as it is that the people have all the rights which are expressly reserved.

We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the Constitution, to supply what we might conceive to be its defects, to fill up every casus omissus, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The Constitution has given us a list of the things which the legislature may not do. If we extend that list,

we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied, for the faithful execution of them, on the wisdom and honesty of that department, and on the direct accountability of the members of their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary.

There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do, if its members forget all their duties; disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be imagined to be as corrupt and as wicked as legislators. * * * What is worse still, the judges are almost entirely irresponsible, and heretofore they have been altogether so, while the members of the legislature, who would do the imaginary things referred to, "would be scourged into retirement by their indignant masters."

I am thoroughly convinced that the words of the Constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the Constitution, must be addressed to the people, and not to us. * * *

[After referring to various dicta to the contrary:] On the other side, the weight of authority is overwhelming. I am not aware that any state court has ever yet held a law to be invalid, except where it was clearly forbidden. Certainly, no case of a different character has been cited at the bar. In the many cases which affirm the validity of state laws, this principle is uniformly recognized, either tacitly or expressly. The Supreme Court of the United States has adhered to it on every occasion when it has been questioned there. In Satterlee v. Matthewson (2 Pet. 380, 7 L. Ed. 458), an act of the Pennsylvania legislature was censured as un-

wise and unjust; but, because it came within no express prohibition of the Constitution, it was held to be binding on the parties interested; and in Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162, it was declared that, while the legislature was within the Constitution, even corruption did not make its acts void. In Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, Mr. Justice Iredell said: "If a state legislature shall pass a law, within the general scope of their constitutional powers, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard, the ablest and the purest men have differed upon the subject; and all the court, in such an event, could say, would be that the legislature (possessed of an equal right of opinion) had passed an act, which, in the opinion of the judges, was contrary to abstract principles of right." * * *

Judge Baldwin in Bennett v. Boggs, 1 Bald. 74, Fed. Cas. No. 1,319, [said]: "* * * We cannot declare a legislative act void because it conflicts with our opinion of policy, expediency, or justice." * * *

There is another rule which must govern us in cases like this; namely, that we can declare an Act of Assembly void, only when it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language. Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162; Cooper v. Telfair, 4 Dall. 14, 1 L. Ed. 721; Moore v. Houston, 3 Serg. & R. 178; Eakin v. Raub, 12 Serg. & R. 339; Com. ex rel. O'Hara v. Smith, 4 Bin. 123. A citation of all the authorities which establish it would include nearly every case in which a question of constitutional law has arisen. I believe it has the singular advantage of not being opposed even by a dictum.

We are to inquire then, whether there is anything in the Constitution which expressly or by clear implication forbids the legislature to authorize subscriptions by a city to the capital stock of a company incorporated for the purpose of making a railroad. * * *

[Here follows a discussion upholding taxation to pay such subscriptions as being in fact for a public purpose and not within any specific prohibition of the state Constitution. Cases to this effect from other states are cited.] These cases are entitled to our highest respect. In most of them, and especially the later ones, the subject is very ably discussed, and they are a manifest triumph of reason and law over a strong conviction in the minds of the judges that the system they sustain was impolitic, dangerous, and immoral. * * *

Injunction refused.

[WOODWARD and KNOX, JJ., gave concurring opinions.]

BORGNIS v. FALK CO. (1911) 147 Wis. 327, 348–350, 133 N. W. 209, 215, 216, WINSLOW, C. J. (upholding a Wisconsin workmen's compensation act upon an "elective" insurance plan):

"In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained, unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. That governments founded on written Constitutions which are made difficult of amendment or change lose much in flexibility and adaptablity to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written Constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A Constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystallize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the Constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

"Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and implicitly obeyed, so long as they remain unamended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present day people and conditions? When an eighteenth century Constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes.

"Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and

ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions and difficulties resulting therefrom is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument."

# THE THREE DEPARTMENTS OF GOVERNMENT[1]

## MERRILL v. SHERBURNE.

(Superior Court of New Hampshire, 1818. 1 N. H. 199, 8 Am. Dec. 52.)

[Appeal from the probate court of Rockingham county, New Hampshire. This court allowed the probate of an instrument as the will of Nathaniel Ward, in which all his property was devised to Merrill. Sherburne, one of Ward's heirs, appealed from this decision to the Superior Court, where this decree was reversed, and, after refusing a motion for a new trial, the court rendered final judgment for Sherburne. The legislature, on Merrill's petition, passed an act granting to him a new trial in the Superior Court. Sherburne moved to quash the proceedings thus begun by Merrill, as based on an unconstitutional exercise of judicial power by the legislature.]

WOODBURY, J. * * * 1. No particular definition of judicial powers is given in the Constitution; and considering the general nature of the instrument, none was to be expected. Critical statements of the meanings, in which all important words were employed, would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But "powers judicial," "judiciary powers," and "judicatories" are all phrases used in the Constitution; and though not particularly defined, are still so used to designate with clearness, that department of government, which it was intended should interpret and administer the laws. On general principles therefore, those inquiries, deliberations, orders and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. 6 Bac. Stat. 11; Ogden v. Blackledge, 2 Cranch, 272, 2 L. Ed. 276; Dash v. Van Kleeck, 7 Johns. (N. Y.) 498, 5 Am. Dec. 291. In fine, the law is applied by the one, and made by the other.[2] To

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 50–56.

For additional cases under this topic, see cases under The Federal Executive, post, pp. 35–42.

[2] "What constitutes the distinction between a legislative and judicial act? The former establishes a rule regulating and governing in matters or transactions occurring after its passage. The other determines rights or obliga-

do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, "as a rule of civil conduct" (1 Bl. Com. 44), because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated. * * *

The grant of a new trial belongs to the courts of law from immemorial usage. The power to grant a new trial is incidental to their other powers. It is a judgment in relation to a private controversy; affects what has already happened; and results from a comparison of evidence and claims with the existing laws. It will not be denied, that the consideration and decision, by the Superior Court, of the motion for this same new trial was an exercise of judicial power. If so a consideration and decision upon the same subject by the legislature must be an exercise of power of the same description; for what is in its nature judicial to-day, must be judicial to-morrow and forever. The circumstance, also, that the legislature themselves did not proceed to make a final judgment on the merits of the controversy between these parties cannot alter the character of the act granting a new trial. To award such a trial was one judicial act, and because they did not proceed to perform another, by holding that trial before themselves, the first act did not become any more or less a judicial one. We apprehend, therefore, that the character of the act under consideration must be deemed judicial. This position will probably be less doubted, than the position that our Constitution has not confided to the legislature the power to pass such an act. But that power, if confided, must be exercised by the legislature as a branch of the judiciary, or under some special provision, or as a mere legislative body.

2. Our next inquiry, then, is, whether they, as a branch of the judiciary, are enabled to exercise it. * * * At the formation of our present Constitution, whatever might have been the prior connection between the legislative and judicial departments, a great solicitude existed to keep them, thence forward, on the subject of

tions of any kind, whether in regard of persons or property, concerning matters or transactions which already exist and have transpired ere the judicial power is invoked to pass on them." Thornton, J., in Smith v. Strother, 68 Cal. 194, 196, 197, 8 Pac. 852, 853, 854 (1885).

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other provides what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is, to that extent, a judicial one, and not the proper exercise of legislative functions." Field, J. (in dissenting opinion), in Sinking Fund Cases, 99 U. S. 727, 761, 25 L. Ed. 504 (1879).

private controversies, perfectly separate and independent. 1 Bl. C. Apx. A: Letter of Judges Sup. Court of United States, April, 1782.

It was well known and considered, that "in the distinct and separate existence of the judicial power consists one main preservative of the public liberty" (Bl. Com. 269); that, indeed, "there is no liberty, if the power of judging be not separated from the legislative and executive powers" (Montesquieu, B. 11, Ch. 6). In other words that "the union of these two powers is tyranny" (7 Johns. 508); or, as Mr. Madison observes, may justly be "pronounced the very definition of tyranny" (Fed. No. 47); or, in the language of Mr. Jefferson, "is precisely the definition of despotic government" (Notes on Vir. 195).

Not a single Constitution therefore, exists in the whole Union, which does not adopt this principle of separation as a part of its basis. Fed. No. 81; 1 Bl. Apx. 126, Tuck. Ed.; 3 Niles' Reg. 2; 4 Niles' Reg. 400. We are aware, that in Connecticut, till lately, and still in New York, a part of their legislature exercise some judicial authority. 4 Niles' Reg. 443. This is probably a relic of the rude and monarchical governments of the Eastern world; in some of which no division of powers existed in theory, and very little in practice. Even in England the executive and judicial departments were once united (1 Bl. 267; 2 Hutch. His. 107); and when our ancestors emigrated hither, they from imitation, smallness of numbers and attachment to popular forms, vested often in one department not only distinct, but sometimes universal powers (2 Wil. Wks. 50; 1 Minot, His. 27; 1 Hutch. His. 30; 2 Hutch. His. 250, 414).

The practice of their assemblies to perform judicial acts (Calder and Wife v. Bull et al., 3 Dal. 386, 1 L. Ed. 648) has contributed to produce an impression, that our legislatures can also perform them. But it should be remembered, that those assemblies were restrained by no Constitutions, and that the evils of this practice (Fed. No. 44), united with the increase of political science have produced the very changes and prohibitions before mentioned. The exceptions in Connecticut and New York do not affect the argument; because those exceptions are not implied, but detailed in specific terms in their charters; and this power, also, as in the House of Lords in England, is in those states to be exercised in the form of judgments and not of laws; and by one branch, and not by all, of the legislature. 4 Niles' Reg. 444. "The entire legislature can perform no judiciary act." Fed. No. 47. * * *

One great object of Constitutions here (Fed. No. 81) was to limit the powers of all the departments of government (Bill of Rights, arts. 1, 7, 8, 38); and our Constitution contains many express provisions in relation to them, which are wholly irreconcilable with the exercise of judicial powers by the legislature, as a branch of the judiciary. That clause, which confers upon the "general court" the

authority "to make laws," provides at the same time, that they must not be "repugnant or contrary to the Constitution." One prominent reason for creating the judicial, distinct from the legislative department, was, that the former might determine when laws were thus "repugnant," and so operate as a check upon the latter, and as a safeguard to the people against its mistakes or encroachments. But the judiciary would in every respect cease to be a check on the legislature, if the legislature could at pleasure revise or alter any of the judgments of the judiciary. * * * [The law was held also to violate a constitutional prohibition against retrospective legislation.]

The long usage of our legislatures to grant new trials has also been deemed an argument in favor of the act under consideration. But that usage commenced under colonial institutions, where legislative powers were neither understood nor limited as under our present constitution. Since the adoption of that, the usage has been resisted by sound civilians, and often declared void by courts of law. Though no opinions have been published, and though the decisions have been contradictory, yet the following ones appear by the records to have adjudged such acts void: Gilman v. McClary, Rock., Sept., 1791; Chickering v. Clark, Hills; Butterfield v. Morgan, Ches., May, 1797; Jenness et al., Ex'rs, v. Seavey, Rock., Feb. 1799. Nor could it be pretended on any sound principles, that the usage to pass them, if uninterrupted for the last twenty-seven years, would amount to a justification, provided both the letter and spirit of the written charter of our liberties forbid them. * * *

Proceedings quashed.

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## CARTER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia, 1899. 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310.)

[Error to the Circuit Court of Lynchburg. Carter was informed by his attorney that his presence in court was necessary at once in a case in which he was a party. He falsely telegraphed that he was sick and could not come, seeking to obtain a continuance of his case. When ordered to appear before the court to show cause why he should not be punished for contempt, Carter made an excuse for his conduct and asked for a jury trial. The court held his excuse insufficient and sentenced him to pay a fine of $25 and be imprisoned for two days, without a jury trial. Other facts appear in the opinion.]

KEITH, P. J. * * * [A Virginia statute of 1830–31 was amended in 1897–98 to read as follows:[3]]

[3] Sec. 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby

The Constitution now in force (article 6, § 1) provides: "There shall be a supreme court of appeals, circuit courts and county courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this Constitution, shall be regulated by law." In a subsequent portion of the instrument, corporation courts are also provided for the cities of the state. These courts do not derive their existence from the legislature. They are called into being by the Constitution itself, the same authority which creates the legislature and the whole framework of state government.

What was the nature and character of the tribunals thus instituted? Our conception of courts, and of their powers and functions, comes to us through that great system of English jurisprudence known as the "common law," which we have adopted and incorporated into the body of our laws.

That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilmot: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme court of justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the lex terræ, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other." 3 Camp. Lives of Ch. Just. p. 153.

declared to be direct contempts, all other contempts being indirect contempts.

First. Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

Second. Violence or threats of violence to a judge or officer of the court or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

Third. Misbehavior of an officer of the court in his official character.

Fourth. Disobedience or resistance of an officer of the court, juror or witness to any lawful process, judgment, decree or order of the said court.

[If requested by the defendant, provision was made for the trial by jury of indirect contempts.]

In United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 259, it was held that "certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute."

In Wells v. Com., 21 Grat. (62 Va.) 503, it was said: "The power to fine and imprison for contempt is incident to every court of record. The courts, ex necessitate, have the power of protecting the administration of justice, with a promptness calculated to meet the exigency of the particular case."

It is unnecessary, however, to multiply authority upon this point, for we understand it to have been conceded by counsel for plaintiff in error that the power to punish contempts is inherent in all courts; but the contention is that it may be regulated by legislative action, and we are prepared to concede that it is proper for the legislature to regulate the exercise of the power so long as it confines itself within limits consistent with the preservation of the authority of courts to enforce such respect and obedience as is necessary to their vigor and efficiency. * * *

It was contended by counsel for plaintiff in error that, inasmuch as the act of 1897–98 merely transferred the punishment of contempts from the court to a jury, and even made acts punishable as contempts not embraced within the act of 1830–31, that it was not obnoxious to the objection that it interfered with or diminished the power of the court to protect itself.

To this view we cannot assent. It is not a question of the degree or extent of the punishment inflicted. It may be that juries would punish a given offense with more severity than the court; but yet the jury is a tribunal separate and distinct from the court. The power to punish for contempts is inherent in the courts, and is conferred upon them by the Constitution by the very act of their creation. It is a trust confided and a duty imposed upon us by the sovereign people, which we cannot surrender or suffer to be impaired without being recreant to our duty.

Upon the point made by counsel for plaintiff in error, that the offense under consideration, if not embraced within the category of direct contempts by the act of 1897–98, neither was it by that of 1830–31, we cannot do better than to quote the language of the supreme court of Arkansas, in State v. Morrill, 16 Ark. at page 390:

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers

of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American people.

"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department, because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and devest them of power to punish any contempt."

Reliance was placed by counsel for plaintiff in error upon a class of cases of which Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, may be considered typical. In that case Robinson had in the most summary manner, without the opportunity of defense, been stricken from the roll of attorneys by the district court for the Western district of Arkansas. He applied to the supreme court for a mandamus, which is the appropriate remedy to restore an attorney who has been disbarred, and that court held, Mr. Justice Field delivering the opinion, that: "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence, and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2, 1831," and the court declared that there could be no question as to its application to the circuit and district courts. "These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

Turning to the Constitution of the United States, we find that it (article 3, § 1) declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and estab-

lish." This language is the equivalent of that found in our Constitutions prior to that of 1851, hereinbefore quoted. The inferior federal courts and their jurisdiction are the creatures of congress, and not of the Constitution. * * *

[Here it is remarked that the federal statute of 1831 is so comprehensive as completely to protect the courts, and that their power to punish in the enumerated cases is unlimited.]

The enumeration of subjects punishable as direct contempts in the act under consideration seems to embrace almost every conceivable form of that offense which can occur in the presence of, or in proximity to, the court; that is to say, under circumstances likely to arouse the passion or prejudice of the judge, and disturb that equanimity essential to calm and wise judicial action. The court may punish summarily not only all such offenses, but for disobedience or resistance to any lawful process, judgment, decree, or order; its officers, jurors, and witnesses may also thus be punished; and only the parties to the suit are entitled to a trial by jury. Thus we see that offenses of a nature personal to the court are to be punished by the court, while those which interest suitors are punishable only by a jury. So that suitors, having obtained a judgment or decree, after long and expensive litigation, find the court powerless to secure to them its fruition and enjoyment, and, unless their antagonist chance to be a law-abiding citizen, discover that their success has only begotten another controversy. Ours is a law-abiding community, and good citizens will, without compulsion, respect the lawful orders of their courts; but in every society there are those who obey the laws only because there is behind them a force they dare not resist. Is it wise or beneficent legislation which accepts the obedience of the good citizen, but is powerless to enforce the law against the recalcitrant? Under this law, the authority of the courts would be reduced to a mere "power of contention." * * *

Reading the Constitution of the state in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusions:

That in the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that, while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred. * * *

We cannot more properly conclude this opinion than by a quota-

tion from a great English judge: "It is a rule founded on the reason of the common law that all contempts to the process of the court, to its judges, jurors, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially,—that is to say, whether they be by act or writing,—are punishable by the court itself, and may be abated instanter as nuisances to public justice. There are those who object to attachments as being contrary, in popular constitutions, to first principles. To this it may briefly be replied that they are the first principles, being founded on that which founds government and constitutes law. They are the principles of self-defense,—the vindication, not only of the authority, but of the very power of acting in court. It is in vain that the law has the right to act, if there be a power above the law which has a right to resist. The law would then be but the right of anarchy and the power of contention." Holt, on Libel, c. 9. * * *

Judgment affirmed.

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## WESTERN UNION TELEGRAPH COMPANY v. MYATT.

(Circuit Court of the United States, District of Kansas, 1899. 98 Fed. 335.)

[Application of complainant for a temporary injunction restraining the Kansas court of visitation from enforcing against complainant certain maximum rates prescribed by it. The facts appear in the opinion.]

HOOK, District Judge. The act of the legislature creating the court of visitation and defining its jurisdiction and powers, and the act fixing the maximum rates for telegraphic service, and conferring jurisdiction respecting telegraph companies upon the court of visitation, are parts of the same general body of legislation affecting public service corporations that was enacted at the special session of the Kansas legislature of 1898. * * *

The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of

the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

As applied to this case, the power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts. * * * It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different.

In Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, the legislative act authorized a railroad and warehouse commission to compel common carriers to adopt such rates and charges as the commission "shall declare to be equal and reasonable." The supreme court of the state held that the finding of the commission was final and conclusive, and that the law neither contemplated nor allowed an issue to be made, nor an inquiry to be had, as to their equality and reasonableness in

fact. The supreme court of the United States held that, if this were the correct interpretation, and the decision of the state court was conclusive upon that point, the law conflicted with the Constitution of the United States, because it "deprived the company of its right to a judicial investigation under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substituted therefor, as an absolute finality, the action of a railroad commission, which in view of the powers conceded to it by the state court, could not be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." This decision illustrates to some extent the limit of the power of the legislature in respect of such matters. It cannot place its own enactments beyond the constitutional jurisdiction of the courts.

On the other hand, as to the province of the courts, it was said in Reagan v. Trust Co., 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. Ed. 1014, 1023: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." * * *

In the Express Cases, 117 U. S. 1, 29, 6 Sup. Ct. 628, 29 L. Ed. 791, 803, the court, in speaking of the action of the trial court in fixing and regulating the terms upon which the railroad company and the express company should do business, said: "In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves. * * * The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

In Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 682, 4 Sup. Ct. 192, 28 L. Ed. 297, the court said: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation." * * *

In Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 499, 17 Sup. Ct. 900, 42 L. Ed. 243, Mr. Justice

Brewer, in delivering the opinion of the court, said: "It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative act."

The foregoing will serve to illustrate sufficiently the line of demarkation between legislative and judicial functions as respects the subject-matter under consideration. * * *

What, then, is the nature of the powers conferred upon the court of visitation? It is apparent from even a cursory examination of those parts of the act of the legislature which define the primary powers and jurisdiction of that body that they are largely of a legislative or administrative character, and such as do not pertain to the functions of a court. It is difficult to define the precise difference between those that are legislative and those that are administrative. It is unnecessary, however, to do so in this case, for it is immaterial whether the powers of that court, so called, aside from those that are judicial, are of the one character or of the other, or are a blending of both. A court does not (to use the language of the act) "classify freight," nor "require the construction and maintenance of depots, switches, side tracks, stock yards, cars, and other facilities for the public convenience," nor "regulate crossings and intersections of railroads," nor "regulate the operation of trains" over such crossings and intersections, nor "prescribe rules concerning the movements of trains to secure the safety of employés and the public," nor "require the use of improved appliances and methods to avoid accidents and injuries to persons," nor "apportion transportation charges among connecting carriers," nor "regulate charges for part car-load and mixed car-load lots of freight, including live stock," nor prescribe what rates of transportation of freight and passengers shall be charged. The regulation of such matters is legislative in its character, not judicial. The Express Cases, supra.

Of course, courts of chancery, in the exercise of their equity jurisdiction, may, and frequently do, through the medium of receivers, appointed by them, exercise some of such powers in the administration of property which is the subject-matter of litigation in such courts, and especially where, in order to preserve the value of such property while it is in the possession of the court, it is necessary to continue the operation thereof, and maintain it as a going concern. But it is not in such sense that these powers were conferred upon the court of visitation. Courts also have the undoubted power to determine some of these matters, if they properly lie in the road to the ultimate adjudication of other existing controversies concerning which the jurisdiction of the court has been invoked; as, by way of illustration, where, in litigation over the destruction of life or property in a railroad accident, it be-

comes material to ascertain whether the company used proper appliances and methods to avoid such an occurrence. Nor is it to this end that the powers mentioned were conferred upon the court of visitation. The exercise of the powers granted contemplates the prescribing of rules and regulations for future guidance, and the possession of such powers by the court of visitation makes it one of the potential agencies of the legislative department of the state. To use the expression of a learned justice of the supreme court, the court of visitation, in respect of such functions, is "an active, seeking, supervising body; the eye and the activity of the state." As to such powers and duties the court of visitation is not, and cannot be, a court. Practically all of the powers then possessed by the board of railroad commissioners of Kansas, which was purely an administrative body, were conferred upon the court of visitation, and as an evidence of the legislative purpose and intent the then existing laws relating to the appointment, powers, and duties of the board of railroad commissioners were, by act of the legislature, repealed a few days after the passage of the act creating the court of visitation. * * *

It was argued at the bar on behalf of the defendants that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9 of section 8 of the act, which authorize the court of visitation to "prescribe rules concerning the movements of trains to secure the safety of employés and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons." Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act. To use the language of the supreme court of Kansas in The Auditor v. Railroad Co., 6 Kan. 509, 7 Am. Rep. 575: "It certainly could not be so in the sense in which our Constitution uses the term, or it would, of necessity, obliterate the lines by which the framers of that instrument sought to keep

separate and distinct the three branches of our government." As was said in Re Huron, 58 Kan. 156, 48 Pac. 576, 36 L. R. A. 824, 62 Am. St. Rep. 614: "Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer."

Counsel say: "The decision of a question which may arise between different railroad companies as to how much of a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive." That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the court of visitation. The intent of the act of the legislature was, not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the state and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?

The fact that the legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and powers conferred upon it. That question is not determined by the terminology employed in the act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. The Constitution of the state of Kansas authorizes the creation of courts inferior to the supreme court by act of the legislature, and, by necessary implication, the defining of the jurisdiction of the courts so created. Article 3, § 1. Nevertheless such jurisdiction must, in all essential particulars, be judicial in its character, and the constitutional authority for other courts than those specifically named in the Constitution must be so construed and limited. Under the Constitution, the legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal, as constituted by legislative act, may be denominated a court, may possess a seal, and be clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise. The legislature may create a court of visitation, but it can only be a court in respect of matters of a judicial nature, and such as are properly incidental thereto. It is clear, however, that it was the intention of the legislature in the enactment of the law to confer certain judicial powers upon the court of visitation in respect of the same matters over which that court was authorized to exercise legislative and administrative functions. It was clearly the legislative

intent to confer upon the court of visitation not only the power to prescribe rules and regulations for the government of railroad and telegraph companies in their relations to the public and to each other, but also the power to pass judicially upon the validity of such rules and regulations, to render judgment accordingly, and full power to execute their orders and judgments. By the language of the act under consideration, the court of visitation can prescribe a tariff of rates and charges, judicially determine the reasonableness thereof, and then enforce their judicial determinations in as radical and complete a method as could be devised. Concisely stated, the court of visitation may make laws, sit judicially upon their own acts, and then enforce their enactments which have received their judicial sanction. Can this be done? * * *

Counsel also contend that there is no provision of the Constitution of the state of Kansas inhibiting the commingling of legislative, judicial, and executive powers, and the conferring by the legislature of the functions of one department upon the other. * * * But there is no such omission in the Constitution of Kansas. It provides as follows: Article 1, § 1: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general and superintendent of public instruction," etc. Article 2, § 1: "The legislative power of this state shall be vested in a house of representatives and senate." Article 3, § 1: "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law," etc.

That, in a broad sense, the powers of one of these departments shall not be conferred upon either of the others, is not only within the true spirit of these provisions, but also substantially within the letter thereof; and the addition thereto of an express prohibitory declaration, such as is contained in the Constitutions of some of the states, that the powers of one department shall not be exercised by another, would add very little to their effect, so far as concerns the question under consideration. The universal doctrine of American liberty under written Constitutions requires the distribution of all the powers of government among three departments,—legislative, judicial, and executive,—and that each, within its appropriate sphere, be supreme, co-ordinate with, and independent of, both the others. * * *

There is a full accord among elementary writers and publicists who treat of the growth and development of the principles of an enlightened government and the relations between the state and the individual. Dr. Paley says: "The first maxim of a free state is that the laws be made by one set of men and administered by

another; in other words, that the legislative and judicial characters be kept separate." Moral Philosophy, bk. 6, c. 8.

Blackstone says: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative." 1 Bl. Comm. 269.

Baron Montesquieu writes: "When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judiciary power if it be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers,—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Spirit of Laws, bk. 11, c. 6.

It is true that this is ancient doctrine, but it serves no ill purpose to renew familiarity therewith, especially in times when it is claimed that the complexity of commercial affairs affords sufficient cause to either undermine or openly destroy those safeguards that are deemed so essential to the permanency of a free government.

In the distribution of the powers of government between the three departments the federal Constitution is as general in its provisions as that of the state of Kansas. There is the same absence of any positive and specific prohibition against the conferring of the powers of the one upon the other. In Kilbourn v. Thompson [103 U. S. 191, 26 L. Ed. 377] it was said: "It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be

vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriated to its own department, and no other. * * * The Constitution declares that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the congress, or either branch of it, save in the cases specifically enumerated to which we have referred." * * *

The decisions of the supreme court of Kansas upon the interpretation of the fundamental law of the state in regard to this question and the application thereof to legislative enactments are to the same effect, and in such matters they are binding upon this court. * * * [Here follow quotations from In re Huron, 58 Kan. 152, 48 Pac. 576, 36 L. R. A. 824, 62 Am. St. Rep. 614, In re Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261, and Auditor v. Ry. Co., 6 Kan. 500, 7 Am. Rep. 575.] Following the decisions of the highest court in the state, I am therefore constrained to hold that the act of the legislature is violative of the provisions of the Constitution of the state of Kansas. * * *

Temporary injunction granted.[4]

[4] The Virginia Constitution of 1902 provided (sections 155, 156) for a Corporation Commission in which various powers were united. Of this it was said by Harrison, J., in Winchester & S. Ry. Co. v. Commonwealth, 106 Va. 264, 267–270, 55 S. E. 692, 693 (1906) [approved in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 225, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908)]:

"This court has recognized the validity of the State Corporation Commission as a legally constituted tribunal of the state, clothed with legislative, judicial, and executive powers. Atlantic Coast Line v. Commonwealth, 102 Va. 599, 46 S. E. 911; Norfolk, etc., Co. v. Commonwealth, 103 Va. 294, 49 S. E. 39. In the last-named case, at page 295 of 103 Va., page 41 of 49 S. E., it is said: 'The State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental power for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial, and executive powers.' * * * [Here follow references to the exercise of both legislative and judicial powers by the British House of Lords; to Calder v. Bull, 3 Dall. 386, 394, 395, 1 L. Ed. 648, denying that the federal Constitution forbade a state legislature to exercise judicial functions, as by granting new trial; and to Satterlee v. Matthewson, 2 Pet. 380, 413, 7 L. Ed. 458.]

"The doctrine that it is competent for a state to unite in one board or tribunal some of the legislative, executive, and judicial powers of the government, as well as the further proposition, that when a state does this, it violates no prohibition of the federal Constitution, and that any such question is one for the determination of the state, its action in the matter being ac-

# THE FEDERAL EXECUTIVE[1]

## STATE OF MISSISSIPPI v. JOHNSON.

(Supreme Court of United States, 1867. 4 Wall. 475, 18 L. Ed. 437.)

[Original proceeding to enjoin the enforcement in Mississippi of certain federal statutes providing for the government by military commanders under authority of Congress of certain of the Southern states lately in rebellion. President Johnson had vetoed them as unconstitutional, and they had been passed over his veto.]

Mr. Chief Justice CHASE. A motion was made, some days since, in behalf of the state of Mississippi, for leave to file a bill in the name of the state, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the district of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named. The acts referred to are those of March 2 and March 23, 1867, commonly known as the Reconstruction Acts. The Attorney General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court. This point has been fully argued, and we will now dispose of it.

cepted as final, is well supported by the more recent case of Dreyer v. Illinois, 187 U. S. 71, 84, 23 Sup. Ct. 28, 32 (47 L. Ed. 79) in which Mr. Justice Harlan, delivering the unanimous opinion of the court, says: 'Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons, belonging to one department, may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." Story's Const. (5th Ed.) 393. Again: "Indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." Story's Const. (5th Ed.) 395.' "

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 66, 69.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime. The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the state of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import. A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of Marbury v. Madison, Secretary of State, 1 Cranch, 137, 2 L. Ed. 60, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by mandamus issuing from a court having jurisdiction. So, in the case of Kendall, Postmaster General, v. Stockton & Stokes, 12 Pet. 527, 9 L. Ed. 1181, an act of Congress had directed the Postmaster General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced. In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander in chief. The duty thus im-

posed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance." It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it. Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it. Occasions have not been wanting. The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of states and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular states. But no one seems to have thought of an application for an injunction against the execution of the act by the President. And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied. The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President? The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of

Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

It is true that a state may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a state.

Motion denied.

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## LUTHER v. BORDEN.

(Supreme Court of United States, 1849. 7 How. 1, 12 L. Ed. 581.)

[Error to the federal Circuit Court for Rhode Island from a judgment for defendant in an action of trespass for breaking into plaintiff's house. The facts appear in Koehler v. Hill, pp. 2–3, ante.]

Mr. Chief Justice TANEY. * * * The Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican govern-

ment, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided that, "in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it, and inquire which party represented a majority

of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the act which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the state, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed Constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign states of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same state are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish

as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of Martin v. Mott, 12 Wheat. 29–31, 6 L. Ed. 537. The first clause of the first section of the Act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a state government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the state. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power, shall fall into error, or invade the rights of the people of the state, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is, whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a state. Unquestionably, a military government, established as the permanent government of the state, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union, as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of

Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable. * * *

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every state resides in the people of the state, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

Judgment affirmed.

# JURISDICTION OF FEDERAL COURTS [1]

## OSBORN ET AL. v. PRESIDENT, ETC., OF THE BANK OF THE UNITED STATES.

(Supreme Court of United States, 1824. 9 Wheat. 738, 6 L. Ed. 204.)

[Appeal from the federal Circuit Court for Ohio. The Bank of the United States, chartered by Congress, brought suit in said court, as authorized by its charter, to restrain Osborn and others, state officers, from collecting a state tax upon the bank. The defendants appealed from a decree against them.]

Mr. Chief Justice MARSHALL. * * * We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts. * * *

The third article [of the Constitution] declares, "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause enables the Judicial Department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.

The suit of the Bank of the United States v. Osborn and others is a case, and the question is, whether it arises under a law of the United States. The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress. If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the Constitution, laws, or treaties of the United States. * * *

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 89, 91, 94, 95.

exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is coextensive with the judicial power. We find in the Constitution no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate; but does not insinuate that, in any such case, the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the state; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union

to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and, if it was constitutional then, it cannot cease to be so because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the

cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not. * * *

The clause giving the bank a right to sue in the circuit courts of the United States stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the Constitution which gives jurisdiction to the federal courts in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act (1 Stat. 73). He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or non assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the Constitution which asserts the right of the legislature to give original jurisdiction to the circuit courts, in cases arising under a law of the United States.

The clause (1 Stat. 322), in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.

It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law.

A naturalized citizen is, indeed, made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. * * * There is, then, no resemblance between the act incorporating the bank and the general naturalization law (2 Stat. 153). * * *

Decree affirmed.

[JOHNSON, J., gave a dissenting opinion.]

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## HANS v. LOUISIANA.

**(Supreme Court of United States, 1890. 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842.)**

[Error to the federal Circuit Court for the Eastern District of Louisiana. In 1874 Louisiana issued certain bonds, and by constitutional amendment pledged the proceeds of a certain special tax for their payment. In 1879 the new state constitution repudiated these obligations and forbade state officers to fulfill them. Hans, a citizen of Louisiana, sued the state in the above federal court to recover the interest due upon some of said bonds held by him, alleging that said provisions of the new constitution violated the federal Constitution by impairing the obligation of these bond contracts. The state denied the court's jurisdiction and the suit was dismissed.]

Mr. Justice BRADLEY. * * * The question is presented whether a state can be sued in a circuit court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is

within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the third article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the circuit court, which, as found in the act of March 3, 1875, is as follows, to wit: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

It is said that these jurisdictional clauses make no exception arising from the character of the parties, and therefore that a state can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that, where the jurisdiction depends alone upon the character of the parties, a controversy between a state and its own citizens is not embraced within it; but it is contended that, though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and, with regard to ordinary parties, this is undoubtedly true. The question now to be decided is whether it is true where one of the parties is a state, and is sued as a defendant by one of its own citizens.

That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. * * * This court held that the suits were virtually against the states themselves, and were consequently violative of the eleventh amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another

state, or by citizens or subjects of a foreign state. It is true the amendment does so read, and, if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that, in cases arising under the Constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that, under the language of the Constitution and of the judiciary act of 1789, a state was liable to be sued by a citizen of another state or of a foreign country. That decision was made in the case of Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the eleventh amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states.

This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court. It did not in terms prohibit suits by individuals against the states, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The supreme court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for after its adoption Attorney General Lee, in the case of Hollingsworth v. Virginia (3 Dall. 378, 1 L. Ed. 644), submitted this question to the court, "whether the amendment did or did not supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state." Tilghman and Rawle argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But on the succeeding day, the court delivered an unanimous opinion "that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the states by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of Chisholm v. Georgia; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. * * * [He] contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present stand-point at the decision in Chisholm v. Georgia, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the Constitution while it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them. * * * [Here follow quotations to this effect from Hamilton in the Federalist, No. 81, and from Madison and Marshall in the Virginia convention of ratification; 3 Ell. Deb. 533, 555.]

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just, and they apply equally to the present case as to that then under discussion.

The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United

States. Some things, undoubtedly, were made justifiable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. * * * Of other controversies between a state and another state or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See Wisconsin v. Insurance Co., 127 U. S. 265, 288, 289, 8 Sup. Ct. 1370, 32 L. Ed. 239, and cases there cited.

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in Chisholm v. Georgia; and it has been conceded in every case since, where the question has, in any way, been presented. * * *

[After referring to various authorities to this effect:] "It may be accepted as a point of departure unquestioned," said Mr. Justice Miller in Cunningham v. Railroad Co., 109 U. S. 446, 451, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, "that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a state may be sued by its own consent, as was the case in Curran v. Arkansas, 15 How. 304, 309, 14 L. Ed. 705, and in Clark v. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. 878, 27 L. Ed. 780. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the Constitution of that state. But this court decided, in Beers v. Arkansas, 20 How. 527, 15 L. Ed. 991, that the state could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of state laws impairing the obligation of a contract. * * *

To avoid misapprehension, it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued or comes itself into court, yet, where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. While the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. But to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

Judgment affirmed.[2]

[HARLAN, J., concurred in the result, dissenting as to the disapproval of Chisholm v. Georgia.]

[2] In Kawananakoa v. Polyblank, 205 U. S. 349, 353, 354, 27 Sup. Ct. 526, 51 L. Ed. 834 (1907) the territory of Hawaii, upon which Congress had conferred general legislative powers in local matters, was held not subject to private suit without its consent, Holmes, J., saying:

"A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. * * * As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as, in the case of a state, the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress, and not by a legislature of the District. [Metropol. Ry. v. Dist. Col., 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231 (1889).]"

The same has been held regarding Porto Rico. Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507 (1913).

## IN RE AYERS.

(Supreme Court of United States, 1887. 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216.)

[Petitions for habeas corpus. Virginia issued bonds in 1871 and 1879 bearing negotiable interest coupons which the state contracted should be received at par in payment of taxes. After the failure of one attempt by the state to repudiate these obligations, Cooper and others, British aliens, bought $100,000 par value of said coupons for $30,000, to sell them to Virginia tax payers. In 1887 a Virginia statute forbade the acceptance of these coupons for taxes until their genuineness had been established in a suit for taxes brought against each person who tendered them in payment thereof, and the state's attorneys were ordered to bring such suits against those who tendered said coupons. Said aliens filed a bill in the federal Circuit Court for the Eastern District of Virginia and obtained an injunction against the bringing of such suits by said officers under this statute. Ayers, the attorney-general, and others, disobeyed this order, and were taken into custody for contempt, for discharge from which they obtained this writ, alleging the Circuit Court's want of jurisdiction for its order under the eleventh amendment.]

Mr. Justice MATTHEWS. * * * It must be regarded as the settled doctrine of this court, established by its recent decisions, "that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record." Poindexter v. Greenhow, 114 U. S. 270, 287, 5 Sup. Ct. 903, 962, 29 L. Ed. 182. * * * [After discussing various cases:] It is therefore not conclusive of the principal question in this case that the state of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record. * * *

It is to be observed that the only personal act on the part of the petitioners sought to be restrained by the original order of June 6, 1887, in pursuance of the prayer of the bill, is the bringing of any suit under the act of May 12, 1887, against any person who had tendered tax-receivable coupons in payment of taxes due to the state of Virginia. Any such suit must, by the statute, be brought in the name of the state and for its use. * * * [Here follow arguments tending to deny the right of coupon-holders to be free from suit for taxes, provided the tender of the coupons was preserved as a defence, and questioning the right of complainants in the injunction suit legally to object to the bringing of such tax suits against their assignees of coupons.]

The substance of the bill * * * does not allege any grounds of equitable relief against the individual defendants for any personal wrong committed or threatened by them. It does not charge against them in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they are parties. The relief sought is against the defendants, not in their individual but in their representative capacity, as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name, and for its own use. If the state had been made a defendant to this bill by name, * * * [and] if a decree could have been rendered enjoining the state from bringing suits against its taxpayers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, viz., the present defendants, its attorney general, and the commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment.

The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant? * * *

The principal authority relied upon to maintain this proposition is the judgment of this court in the case of Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204. * * * But the act of the legislature of Ohio, declared to be unconstitutional and void in that case, had for its sole purpose the levy and collection of an annual tax of $50,000 upon each office of discount and deposit of the bank of the United States within that state, to be collected, in case of refusal to pay, by the auditor of state by a levy upon the money, bank-notes, or other goods and chattels, the property of the bank; to seize which it was made lawful, under the warrant of the auditor, for the person to whom it was directed to enter the bank for the purpose of finding and seizing property to satisfy the same. The wrong complained of and sought to be prevented by the injunction prayed for was this threatened seizure of the property of the bank. An actual seizure thereof, in violation of the injunction, was treated as a contempt of the court, for which the parties were

attached, and the final decree of the circuit court restored the property taken to the possession of the complainant.[3] * * *

The very ground on which it was adjudged not to be a suit against the state, and not to be one in which the state was a necessary party, was that the defendants personally and individually were wrong-doers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that, therefore, it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the state. This they were not permitted to do, because the authority under which they professed to act was void. * * * The vital principle in all such cases is that the defendants, though professing to act as officers of the state, are threatening a violation of the personal or property rights of the complainant, for which they are personally and individually liable. * * *

[After quoting from Poindexter v. Greenhow, 114 U. S. 270, 282, 288, 5 Sup. Ct. 903, 29 L. Ed. 185:] This principle is illustrated and enforced by the case of U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171.[4] In that case the plaintiffs had been wrongfully dispossessed of their real estate by defendants claiming to act under the authority of the United States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of a state or of the United States, where the objection has been interposed that the state was the real defendant, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defend-

[3] In this case Marshall, C. J., said (9 Wheat. at pages 842, 843 [6 L. Ed. 204]): "The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent."

[4] The leading case, the land being actually in use, under orders of the President, as a federal fort and cemetery.

ant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character.

The present case stands upon a footing altogether different. Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the state of Virginia by the acts of its general assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the state, it is conceded there is no remedy by suit against the state itself. This results from the eleventh amendment to the Constitution, which secures to the state immunity from suit by individual citizens of other states or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the state by name, but all other actions and suits against it, whether at law or in equity. A bill in equity for the specific performance of the contract against the state by name, it is admitted could not be brought. In Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 Sup. Ct. 805, it was decided that in such a bill, where the state was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject-matter of the suit, and defending only as representing the state, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state," the court was without jurisdiction, because it was a suit against a state.

The converse of that proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state. * * *

It may be asked what is the true ground of distinction, so far as the protection of the Constitution of the United States is invoked, between the contract rights of the complainant in such a suit, and other rights of person and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the state of Virginia and

the complainants, only as they are considered to be the acts of the state of Virginia. The defendants, as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it. * * * But where the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution.

It cannot be doubted that the eleventh amendment to the Constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. * * * It is different with contracts between individuals and a state. In respect to these, by virtue of the eleventh amendment to the Constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. * * *

The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guarantied by the eleventh amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which

alone in fact the relief is asked, and against which the judgment or decree effectively operates.

But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. * * *

Nor need it be apprehended that the construction of the eleventh amendment, applied in this case, will in anywise embarrass or obstruct the execution of the laws of the United States, in cases where officers of a state are guilty of acting in violation of them under color of its authority. The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction as individuals owing obedience to its authority. The penalties of disobedience may be visited upon them without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself. If, therefore, an individual, acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. * * *

Petitioners discharged.[5]

[FIELD, J., gave a concurring opinion, and HARLAN, J., a dissenting one.]

[5] In Pennoyer v. McConnaughy, 140 U. S. 1, 16–18, 11 Sup. Ct. 699, 35 L. Ed. 363 (1891) an Oregon statute had illegally revoked a contract with the state under which plaintiff acquired rights in certain land, and plaintiff secured an injunction against the resale of said land by the state land commissioners, including the governor. Lamar, J., said:

"The dividing line between the cases [permitting suits against state officers] and the class of cases in which it has been held that the state is a party defendant, and therefore not suable, by virtue of the inhibition contained in the eleventh amendment to the Constitution, was adverted to in Cunningham v. Railroad Co., where it was said, referring to the case of Davis v. Gray [16 Wall. 203, 21 L. Ed. 447 (1873)]: 'Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company.' 109 U. S. 453, 454, 3 Sup. Ct. 298, 609, 27 L. Ed. 992 (1883). Thus holding, by implication, at least,

## KANSAS v. COLORADO.

(Supreme Court of United States, 1902. 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838.)

[Original bill of complaint by Kansas against Colorado, alleging in substance a large diversion of the waters of the Arkansas river as it flowed through Colorado, made by or under the authority of that state for purposes of irrigation, which so diminished the flow of the river below in Kansas as greatly to injure the owners of riparian land, of which Kansas itself owned two small parcels used by it for a soldiers' home and a reformatory. An injunction was prayed against any further diversion of said river in Colorado by that state, and against the granting of any further authority by Colorado to private persons to divert said water, except for domestic use. Demurrer, upon the ground, among others, that the matters alleged showed no controversy between states within the meaning of the Constitution.]

Mr. Chief Justice FULLER. * * * By the 1st clause of § 10 of article 1 of the Constitution it was provided that "no state shall enter into any treaty, alliance, or confederation;" and by the 3d clause that "no state shall, without the consent of the Congress, * * * keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." * * *

Undoubtedly, as remarked by Mr. Justice Bradley in Hans v. Louisiana, 134 U. S. 1, 15, 33 L. Ed. 842, 847, 10 Sup. Ct. 504, 507,

that affirmative relief would not be granted against a state officer, by ordering him to do and perform acts forbidden by the law of this state, even though such law might be unconstitutional. The same distinction was pointed out in Hagood v. Southern, which was held to be, in effect, a suit against the state, and it was said: 'A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs, under color of authority unconstitutional and void.' 117 U. S. 52, 70, 6 Sup. Ct. 616, 29 L. Ed. 805 (1886). * * *

"This suit is not nominally against the governor, secretary of state, and treasurer as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the state or any of its officers. He is not asking that the state be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject-matter of the controversy requisite to complete his title. All that he asks is that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the state when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the state alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights."

the Constitution made some things justiciable "which were not known as such at the common law—such, for example, as controversies between states as to boundary lines and other questions admitting of judicial solution." And as the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution, a wide range of matters, susceptible of adjustment, and not purely political in their nature, was made justiciable by that instrument.

In Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 Sup. Ct. 331, it was alleged that an artificial channel or drain constructed by the sanitary district for purposes of sewerage, under authority derived from the state of Illinois, created a continuing nuisance dangerous to the health of the people of the state of Missouri; and the bill charged that the acts of defendants, if not restrained, would result in poisoning the water supply of the inhabitants of Missouri, and in injuriously affecting that portion of the bed of the Mississippi river lying within its territory. In disposing of a demurrer to the bill, numerous cases involving the exercise of original jurisdiction by this court were examined; and the court, speaking through Mr. Justice Shiras, said:

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court. An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state, but it must surely be conceded that if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering. The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in

the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state. That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as parens patriæ, trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution.

In the case before us the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action, and not the action of state officers in abuse or excess of their powers.

The state of Colorado contends that, as a sovereign and independent state, she is justified, if her geographical situation and material welfare demand it in her judgment, in consuming for beneficial purposes all the waters within her boundaries; and that, as the sources of the Arkansas river are in Colorado, she may absolutely and wholly deprive Kansas and her citizens of any use of or share in the waters of that river. She says that she occupies toward the state of Kansas the same position that foreign states occupy toward each other, although she admits that the Constitution does not contemplate that controversies between members of the United States may be settled by reprisal or force of arms, and that to secure the orderly adjustment of such differences power was lodged in this court to hear and determine them. The rule of decision, however, it is contended, is the rule which controls foreign and independent states in their relations to each other; that by the law of nations the primary and absolute right of a state is self-preservation; that the improvement of her revenues, arts, agriculture, and commerce are incontrovertible rights of sovereignty; that she has dominion over all things within her territory, including all bodies of water, standing or running, within her boundary lines; that the moral obligations of a state to observe the demands of comity cannot be made the subject of controversy between states; and that only those controversies are justiciable

in this court which, prior to the Union, would have been just cause for reprisal by the complaining state; and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights stricti juris withheld.

But when one of our states complains of the infliction of such wrong or the deprivation of such rights by another state, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The states of this Union cannot make war upon each other. They cannot "grant letters of marque and reprisal." They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations, and make treaties. * * *

The publicists suggest as just causes of war: defense; recovery of one's own; and punishment of an enemy. But, as between states of this Union, who can determine what would be a just cause of war? Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a state of this Union deprives another state of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted? * * *

Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one state of the Union to wholly deprive another of the benefit of water from a river rising in the former, and by nature, flowing into and through the latter; and that therefore this court, speaking broadly, has jurisdiction. * * * Sitting, as it were, as an international, as well as a domestic, tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand;[6] and we are unwilling in this case to proceed on the

[6] As to the law that may be applicable to interstate disputes, Brewer, J., said in the principal litigation at a later stage, Kansas v. Colorado, 206 U. S. 46, 97, 98, 27 Sup. Ct. 655, 51 L. Ed. 956 (1907):

"Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. * * * [After quoting from the principal case, above, the sentence to which this note is appended:] One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri v. Illinois [180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497], the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. * * * Surely here is a dispute of a justiciable nature which might and ought to be tried and determined. If the

mere technical admissions made by the demurrer. * * * The result is that in view of the intricate questions arising on the record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

Demurrer overruled, with leave to answer.

[GRAY, J., took no part in the decision.]

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## GREEN v. NEAL'S LESSEE.

(Supreme Court of United States, 1832. 6 Pet. 291, 8 L. Ed. 402.)

[Error to the federal Circuit Court for West Tennessee. A Tennessee statute of limitations of 1797 was construed by the state courts in 1815 not to give title by seven years of adverse possession unless the occupant held under a deed connected with a grant of the land. In Patton's Lessee v. Easton, 1 Wheat. 476, 4 L. Ed. 139 (1816) these decisions were followed by the federal Supreme Court, and also in Powell's Lessee v. Harman, 2 Pet. 241, 7 L. Ed. 411 (1829). In Gray v. Darby's Lessee, Mart. & Y. (Tenn.) 396 (1825) the older Tennessee cases were overruled by the state Supreme Court, and the statute of 1797 was held not to require the occupant's deed to be connected with a grant. In a subsequent ejectment action in the federal court by Neal against Green, the federal decision upon this point was followed, and this writ of error was taken.]

Mr. Justice MCLEAN. * * * Since this decision [Gray v. Darby's Lessee, cited above], the law has been considered as settled in Tennessee; and there has been so general an acquiescence in all the courts of the state, that the point is not now raised or discussed. This construction has become a rule of property in the state, and numerous suits involving title have been settled by it. Had this been the settled construction of these statutes when the decision was made by this court, in the case of Patton's Lessee v. Easton, there can be no doubt that that opinion would have conformed to it. But the question is now raised, whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been directly decided by this court, on a question of general importance. The cases are numerous where the court have adopted the constructions given to the statute of a state by its supreme judicial tribunal; but it has never been decided that this court will overrule their own adjudication, estab-

two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court."

[The bill in the principal case was then dismissed on the merits, after an exhaustive investigation and argument.]

lishing an important rule of property, where it has been founded on the construction of a statute made in conformity to the decisions of the state at the time, so as to conform to a different construction adopted afterwards by the state.

This is a question of grave import, and should be approached with great deliberation. It is deeply interesting in every point of view in which it may be considered. As a rule of property it is important; and equally so, as it regards the system under which the powers of this tribunal are exercised. It may be proper to examine in what light the decisions of the state courts, in giving a construction to their own statutes, have been considered by this court. * * *

The Supreme Court holds in the highest respect decisions of state courts upon local laws forming rules of property. Shipp v. Miller's Heirs, 2 Wheat. 316, 4 L. Ed. 248. In construing local statutes respecting real property, the courts of the Union are governed by the decisions of the state tribunals. Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221. The court says, in the case of Elmendorf v. Taylor et al., 10 Wheat. 152, 6 L. Ed. 289, "that the courts of the United States, in cases depending on the laws of a particular state, will, in general, adopt the construction which the courts of the state have given to those laws." "This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In Shelby v. Guy, 11 Wheat. 361, 6 L. Ed. 495, the court again declares, that "the statute laws of the states must furnish the rule of decision of the federal courts, as far as they comport with the Constitution of the United States, in all cases arising within the respective states; and a fixed and received construction of their respective statute laws, in their own courts, makes a part of such statute law." The court again says, in Jackson ex dem. St. John v. Chew, 12 Wheat. 153, 6 L. Ed. 583, "that this court adopts the local law of real property, as ascertained by the decisions of the state courts, whether these decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which has become a fixed rule of property." Quotations might be multiplied, but the above will show that this court has uniformly adopted the decisions of the state tribunals respectively, in the construction of their statutes, [and] that this has been done as a matter of principle, in all cases where the decision of a state court has become a rule of property.

In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the states. The rights of parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those

laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope.

It is admitted in the argument, that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but it is contended that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule, it does not comport either with the consistency or dignity of this tribunal to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications. That the federal court, when sitting within a state, is the court of that state, being so constituted by the Constitution and laws of the Union; and as such, has an equal right with the state courts to fix the construction of the local law.

On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine them, but its decisions must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question by the highest judicial tribunal of a state should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court; but because, in the language of the court, in the case of Shelby et al. v. Guy, 11 Wheat. 361, 6 L. Ed. 495, "a fixed and received construction by a state, in its own courts, makes a part of the statute law."

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a state as great in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the state, two rules of property.

Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a

local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state, which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it.

If the construction of the highest judicial tribunal of a state form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made. This constitutes the rule of property within the state, by which the rights of litigant parties must be determined. As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed.

The case under consideration illustrates the propriety and necessity of this rule. It is now the settled law of Tennessee that an adverse possession of seven years, under a deed for land that has been granted, will give a valid title. But by the decision of this court such a possession, under such evidence of right, will not give a valid title. In addition to the above requisites, this court have decided that the tenant must connect his deed with a grant. It therefore follows that the occupant whose title is protected under the statutes before a state tribunal, is unprotected by them before the federal court. The plaintiff in ejectment, after being defeated in his action before a state court, on the above construction, to insure success has only to bring an action in the federal court. This may be easily done by a change of his residence, or a bona fide conveyance of the land.

Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the

country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a state. * * *

Judgment reversed.

[BALDWIN, J., dissented.]

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SWIFT v. TYSON (1842) 16 Pet. 1, 16, 18, 19, 10 L. Ed. 865, Mr. Justice STORY (upholding an action brought in the New York federal court by an indorsee of a bill of exchange against the acceptor who had been defrauded by the drawer):

"In the present case, the plaintiff is a bona fide holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. * * *

[After discussing the New York cases:] "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what

the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.

"In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. 'Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.'

"It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable

consideration in the sense of the general rule already stated, as applicable to negotiable instruments."

[CATRON, J., expressed no opinion upon the latter point in the case, so far as concerned instruments taken as collateral security only.]

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## KUHN v. FAIRMONT COAL CO.

**(Supreme Court of United States, 1910. 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228.)**

[Questions certified from federal Circuit Court of Appeals for Fourth Circuit. In 1889, Kuhn, a citizen of Ohio, conveyed to one Camden all the coal under a tract of land in West Virginia owned by Kuhn, granting also the right to enter said land, to remove the coal, and to make all necessary structures, ways, and openings for this purpose. Camden's interest in said coal passed to defendant, a West Virginia corporation, in January, 1906, and the latter in taking out the coal left the surface of Kuhn's land unsupported so that it fell, for which, on January 18, 1906, Kuhn sued defendant in the federal Circuit Court for West Virginia. A similar suit had been brought by one Griffin in the state courts in 1902, which was decided for the defendant by the state supreme court in November, 1905. A rehearing was granted, and on March 27, 1906, final judgment was given against Griffin. Kuhn's suit was decided against him on demurrer by the federal court on April 16, 1907, and he appealed to the Circuit Court of Appeals. Until the decision in the Griffin case there was no statute, decision, or local custom governing the question in controversy in the state. The federal appellate court certified to the Supreme Court the question whether, under these circumstances, it was bound by the decision of the state courts in the Griffin case.]

Mr. Justice HARLAN. * * * Was not the federal court bound to determine the dispute between the parties according to its own independent judgment as to what rights were acquired by them under the contract relating to the coal? If the federal court was of opinion that the coal company was under a legal obligation, while taking out the coal in question, to use such precautions and to proceed in such way as not to destroy or materially injure the surface land, was it bound to adjudge the contrary simply because, in a single case, to which Kuhn was not a party, and which was determined after the right of the present parties had accrued and become fixed under their contract, and after the injury complained of had occurred, the state court took a different view of the law? If, when the jurisdiction of the federal court was invoked, Kuhn, the citizen of Ohio, had, in its judgment, a valid cause of action against the coal company for the injury of which he complained,

was that court obliged to subordinate its view of the law to that expressed by the state court?

In cases too numerous to be here cited, the general subject suggested by these questions has been considered by this court. * * * [Here follow quotations from Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; and Bucher v. Cheshire Ry., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795, and citations of other cases.]

We take it, then that it is no longer to be questioned that the federal courts, in determining cases before them, are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the state courts. 2. Where, *before the rights of the parties accrued*, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled*, it is not only the right, but the duty, of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt. * * *

It would seem that according to those principles, now firmly established, the duty was upon the federal court, in the present case, to exercise its independent judgment as to what were the relative rights and obligations of the parties under their written contract. The question before it was as to the liability of the coal company for an injury arising from the failure of that corporation, while mining and taking out the coal, to furnish sufficient support to the overlying or surface land. Whether such a case involves a rule of property in any proper sense of those terms, or only a question of general law, within the province of the federal court to determine for itself, the fact exists that there had been no determination of the question by the state court before the rights of the parties accrued and became fixed under their contract, or before the injury complained of. In either case, the federal court was bound

under established doctrines to exercise its own independent judgment, with a leaning, however, as just suggested, for the sake of harmony, to an agreement with the state court, if the question of law involved was deemed to be doubtful. If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented.

There are adjudged cases involving the meaning of written contracts having more or less connection with land that were not regarded as involving a rule in the law of real estate, but as only presenting questions of general law, touching which the federal courts have always exercised their own judgment, and in respect to which they are not bound to accept the views of the state courts. * * * [Here follow discussions of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298 (1863); Lane v. Vick, 3 How. 464, 11 L. Ed. 681 (1845); Foxcroft v. Mallett, 4 How. 353, 11 L. Ed. 1008 (1846); Russell v. Southard, 12 How. 139, 13 L. Ed. 927 (1851); Yates v. Milwaukee, 10 Wall. 497, 19 L. Ed. 984 (1871); Louisville Tr. Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334 (1896); Gt. So. Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778 (1904); East Cent. Co. v. Central Eureka Co., 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476 (1907); and Brine v. Hartford Ins. Co., 96 U. S. 627, 24 L. Ed. 858 (1878).]

The question here involved as to the scope and effect of the writing given by Kuhn to Camden does not depend upon any statute of West Virginia, nor upon any rule established by a course of decisions made before the rights of parties accrued. So that the words above quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. ["The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state"] must not be interpreted as applicable to a case like the one before us, nor as denying the authority and duty of the federal court, when determining the effect of conveyances or written instruments between private parties, citizens of different states, to exercise its own independent judgment where no authoritative state decision had been rendered by the state court before the rights of the parties accrued and became fixed.

Question answered in negative.

Mr. Justice HOLMES [with whom concurred WHITE and MCKENNA, JJ.], dissenting. This is a question of the title to real estate. It does not matter in what form of action it arises, the decision must be the same in an action of tort that it would be in a

writ of right. The title to real estate in general depends upon the statutes and decisions of the state within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns, and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what, for all ordinary purposes, is the law.

I admit that plenty of language can be found in the earlier cases to support the present decision. That is not surprising, in view of the uncertainty and vacillation of the theory upon which Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842), and the later extensions of its doctrine, have proceeded. But I suppose it will be admitted on the other side that even the independent jurisdiction of the circuit courts of the United States is a jurisdiction only to declare the law, at least, in a case like the present, and only to declare the law of the state. It is not an authority to make it. Swift v. Tyson was justified on the ground that that was all that the state courts did. But, as has been pointed out by a recent accomplished and able writer, that fiction had to be abandoned and was abandoned when this court came to decide the municipal-bond cases, beginning with Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520 (1864). Gray, Nature & Sources of the Law, §§ 535–550. In those cases the court followed Chief Justice Taney in Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. Ed. 997 (1853), in recognizing the fact that decisions of state courts of last resort make law for the state. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law.

The cases of the class to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision made the law for the state, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared. Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968 (1880); Green County v. Conness, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. Ed. 872 (1883). In various instances this court has changed its decision or rendered different decisions on similar facts arising in different states, in order to conform to what is recognized as the local law. Fairfield v. Gallatin County, 100 U. S. 47, 25 L. Ed. 544 (1879).

Whether Swift v. Tyson can be reconciled with Gelpcke v. Dubuque, I do not care to inquire. I assume both cases to represent settled doctrines, whether reconcilable or not. But the moment you leave those principles which it is desirable to make uniform throughout the United States, and which the decisions of this court tend to make uniform, obviously it is most undesirable for the

courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. The rule in Gelpcke v. Dubuque gives no help when the contract or grant in question has not been made on the faith of a previous declaration of law. I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. There were enough difficulties in the way, even in cases like Gelpcke v. Dubuque, but in them there was a suggestion or smack of constitutional right. Here there is nothing of that sort. It is said that we must exercise our independent judgment—but as to what? Surely, as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue, and has been recognized by this court as issuing, from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else.

If, as I believe, my reasoning is correct, it justifies our stopping when we come to a kind of case that, by nature and necessity, is peculiarly local, and one as to which the latest intimations, and, indeed, decisions of this court are wholly in accord with what I think to be sound law. * * * It is admitted that we are bound by a settled course of decisions, irrespective of contract, because they make the law. I see no reason why we are less bound by a single one.[7]

[7] The federal Circuit Court of Appeals finally followed the West Virginia decision, Pritchard, J., saying: "It must be borne in mind that the decision of the West Virginia Court of Appeals will be held by the courts of that state to be a rule of property in that state in all suits that may be instituted between citizens of said state. If this court should decide otherwise, we would have a condition in that state, which would be without a parallel in judicial procedure. Under such circumstances, we would have one rule of property by which citizens of West Virginia would be governed and an entirely different rule of property where a suit was instituted by a nonresident of West Virginia in the federal court. This would necessarily result in a great injustice and lead to interminable confusion; and, on that account, we would be inclined to adopt the rule of the West Virginia Supreme Court of Appeals, even if, in view of the peculiar provisions of the conveyance by which the land in controversy was transferred, we did not find ourselves in accord with that tribunal." Kuhn v. Fairmont Coal Co., 179 Fed. 191, 210, 102 C. C. A. 457 (1910).

# POWERS OF CONGRESS

## I. General Principles [1]

UNITED STATES v. CRUIKSHANK (1876) 92 U. S. 542, 549–551, 23 L. Ed. 588, Mr. Chief Justice WAITE:

"We have in our political system a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74, 21 L. Ed. 394. * * *

"Experience made the fact known to the people of the United States that they required a national government for national purposes. * * * For this reason, the people of the United States * * * ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rules of action.

"The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states; but beyond, it has no existence. It was erected for special purposes and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

"The people of the United States resident within any state are subject to two governments, one state, and the other national; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the pro-

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 102–104, 106, 107.

cess of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offence against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

"The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states." [2]

[2] "There are within the territorial limits of each state two governments, restricted in their spheres of action, but independent of each other and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every state are bound thereby, 'anything in the Constitution or laws of any state to the contrary notwithstanding.' Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the national tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments."—Field, J., in Tarble's Case, 13 Wall. 397, 406, 407, 20 L. Ed. 597 (1872).

GIBBONS v. OGDEN (1824) 9 Wheat. 1, 187–189, 6 L. Ed. 23, Mr. Chief Justice MARSHALL:

"As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution,

and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

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## McCULLOCH v. MARYLAND.

**(Supreme Court of the United States, 1819. 4 Wheat. 316, 4 L. Ed. 579.)**

[Error to the Court of Appeals of Maryland. In 1816 Congress incorporated the Bank of the United States, and one of its branches was in 1817 established at Baltimore. In 1818 a Maryland statute subjected all banks in the state not chartered by the legislature to a stamp tax upon their note issues. McCulloch, cashier of the said branch bank, was held by the state courts liable to penalties for violating this act, and this writ was taken.]

Mr. Chief Justice MARSHALL. * * * The first question made in the cause is, has Congress power to incorporate a bank? * * * In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state, by the people thereof, under the recom-

mendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a mere perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the Confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. * * *

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. * * *

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation,[3] excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be em-

[3] Article II: "Each state retains * * * every power * * * not * * * expressly delegated."

braced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a goverment, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a

being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. * * *

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. * * * We cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the state of Maryland has urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. * * * The argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the tenth section of the first article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that

which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. * * *

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect

of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause: * * * 1. The clause is placed among the powers of Congress, not among the limitations on those powers. 2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. * * *

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. * * * If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. * * * But were its necessity

less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. * * *

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. * * * The choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. * * *

[The law of Maryland was then held void. This part of the case is printed post, p. 274.]

Judgment reversed.

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LEGAL TENDER CASES (1871) 12 Wall. 457, 532–544, 20 L. Ed. 287, Mr. Justice STRONG (upholding the issue of federal legal tender paper money during the Civil War):

"The powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

"The same may be asserted also of all the non-enumerated powers included in the authority expressly given 'to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.' It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and

mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. * * * That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

"And here it is to be observed it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the states, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the 'conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory

and restrictive clauses should be added.' This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

"And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. * * * Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different states every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the states, but of free persons in the territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

"Indeed, the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, break-waters, and buoys, the registry, enrolment, and con-

struction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the county, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. * * *

"In Fisher v. Blight, 2 Cranch, 358, 2 L. Ed. 304, * * * a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to Congress to be an eligible means to enable the government to pay the debts of the Union. * * *

"Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly, to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

"We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. * * * It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction,

while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? * * *

"But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? * * *

"The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. * * * The case of Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482, presents a suggestive illustration. There a tax of ten per cent. on state bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of national banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if state bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender." [4]

[Bradley, J., gave a concurring opinion, and Chase, C. J., and Clifford and Field, JJ., gave dissenting opinions. Nelson, J., also dissented.]

[4] The principal case overruled Hepburn v. Griswold, 8 Wall. 603, 19 L. Ed. 513 (1870), which had held the Legal Tender Acts invalid as to debts contracted prior to their passage, upon reasoning which equally invalidated them

KANSAS v. COLORADO (1907) 206 U. S. 46, 89–92, 27 Sup. Ct. 655, 51 L. Ed. 956, Mr. Justice BREWER (dismissing a petition of intervention filed by the United States in a suit between Kansas and Colorado to determine their respective rights to the use of the Arkansas river for irrigation purposes, said petition being based upon an alleged superior right of the national government to control the whole system of reclaiming arid lands in a state, whether owned by the United States or not):

"That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. * * * Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them, by any implication, refers to the reclamation of arid lands. The last paragraph of the section, which authorizes Congress to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned.[5] * * *

"[The] argument [for the petition] runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, inde-

as to subsequent debts. The decision was by a vote of 5 to 3; Grier, J., one of the majority, resigning immediately thereafter. The two new judges who were appointed, Strong and Bradley, JJ., made part of the majority in the principal case.

[5] Referring to the preamble of the Constitution, Harlan, J., said, in Jacobson v. Massachusetts, 197 U. S. 11, 22, 25 Sup. Ct. 358, 359, 49 L. Ed. 643, 3 Ann. Cas. 765 (1905): "Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story, Const. § 462."

pendently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the wide-spread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, furthers powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'We, the people of the United States,' not the people of one state, but the people of all the states; and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbank v. United States, 181 U. S. 283, 288, 45 L. Ed. 862, 865, 21 Sup. Ct. 648, 650:

" 'We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words,

if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when, in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.'

"This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised."

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UNITED STATES v. DE WITT (1870) 9 Wall. 41, 43–45, 19 L. Ed. 593, Mr. Chief Justice CHASE (holding invalid a federal statute forbidding any one to offer for sale petroleum illuminating oil below a certain fire test):

"That Congress has power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the states has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

"It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed

on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

"This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes. There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the Act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed. As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as for example, in the District of Columbia. Within state limits, it can have no constitutional operation."

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MONONGAHELA NAVIGATION COMPANY v. UNITED STATES (1893) 148 U. S. 312, 324, 335–337, 341, 343, 13 Sup. Ct. 622, 37 L. Ed. 463, Mr. Justice BREWER (holding invalid a federal statute authorizing condemnation proceedings to acquire a lock and dam constructed by the Monongahela Company under a franchise from Pennsylvania to collect tolls for the use thereof, the statute expressly forbidding the payment of anything for said franchise):

"The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance, for in any society the fullness and sufficiency of the securities which surround the individual in the use

and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first 10 amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights. * * *

"Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the national government, one whose existence and far-reaching extent have been affirmed again and again by this court. * * *

"But, like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. * * * If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction, * * * and * * * that, after taking this property, the government will have the right to exact the same tolls the navigation company has been receiving. It would seem strange that if, by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. * * *

"The theory of the government seems to be that the right of the navigation company to have its property in the river, and the franchises given by the state to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The state has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the state; but it can no more take the franchise which the state has given than it can any private property belonging to an individual. * * *

"It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the navigation company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

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## II. Various Enumerated Powers [6]

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### McCRAY v. UNITED STATES.

**(Supreme Court of the United States, 1904. 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.)**

[Error to the United States District Court for the Southern District of Ohio. A federal statute (Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1911, p. 1339] amending Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]) imposed a tax of 10 cents a pound upon all oleomargarine artificially color-

[6] For discussion of principles, see Black, Const. Law (3d Ed.) § 105.

ed to resemble butter. The United States sued McCray for statutory penalties for his failure to pay this tax on certain oleomargarine, and he alleged that said coloration was not unhealthful, that said tax was so high as to make it impossible to sell such oleomargarine in competition with butter, that there was no demand for uncolored oleomargarine, and that the result of said tax would be to destroy the oleomargarine industry. The government's demurrer to this answer was sustained and judgment rendered thereon.]

Mr. Justice WHITE. * * * The summary which follows embodies the propositions contained in the assignments of error, and the substance of the elaborate argument by which those assignments are deemed to be sustained. Not denying the general power of Congress to impose excise taxes, and conceding that the acts in question, on their face, purport to levy taxes of that character, the propositions are these:

(a) That the power of internal taxation which the Constitution confers on Congress is given to that body for the purpose of raising revenue, and that the tax on artificially colored oleomargarine is void because it is of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue, but to suppress the manufacture of the taxed article.

(b) The power to regulate the manufacture and sale of oleomargarine being solely reserved to the several states, it follows that the acts in question, enacted by Congress for the purpose of suppressing the manufacture and sale of oleomargarine, when artificially colored, are void, because usurping the reserved power of the states, and therefore exerting an authority not delegated to Congress by the Constitution.

(c) Whilst it is true—so the argument proceeds—that Congress, in exerting the taxing power conferred upon it, may use all means appropriate to the exercise of such power, a tax which is fixed at such a high rate as to suppress the production of the article taxed is not a legitimate means to the lawful end, and is therefore beyond the scope of the taxing power. * * *

(f) * * * As the burdens which the acts impose are so onerous and so unjust as to be confiscatory, the acts are void, because they amount to a violation of those fundamental rights which it is the duty of every free government to protect. * * *

We * * * come, first, to ascertain how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the power of that body to enact the laws in question. Having determined the question of our right to consider motive or purpose, we shall then approach the propositions relied on by the light of the correct rule on the subject of purpose or motive. * * *

No instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. * * *

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government. * * * It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. * * * The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine, and, on the contrary, the doctrine of a number of cases is inconsistent with its existence. * * *

In Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482, where a tax levied by Congress on the circulating notes of state banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, it was said, as to the first contention (p. 548, L. Ed. p. 487): "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitu-

tional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." * * *

In Treat v. White, 181 U. S. 264, 45 L. Ed. 853, 21 Sup. Ct. 611, referring to a stamp duty levied by Congress, it was observed (p. 268, L. Ed. p. 855, Sup. Ct. p. 613): "The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy not. It is enough that Congress, in this legislation, has imposed a stamp duty upon the one, and not upon the other."

In Patton v. Brady, 184 U. S. 608, 46 L. Ed. 713, 22 Sup. Ct. 493, considering another stamp duty levied by Congress, it was again said (p. 623, L. Ed. p. 720, Sup. Ct. p. 499): "That it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority. * * * The proposition now relied upon was urged in Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747, and was overruled. * * *

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void

because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited. * * *

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, though none the less potential, guaranties, or, in any event, to be within the protection of the due process clause of the fifth amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the fourteenth amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the fifth amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without author-

ity to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress. * * *

Judgment affirmed.

[FULLER, C. J., and BROWN and PECKHAM, JJ., dissented.]

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FLINT v. STONE TRACY CO. (1911) 220 U. S. 107, 147–152, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, Mr. Justice DAY (upholding a federal excise tax, equivalent to 1 per cent. of its net income above $5,000, levied upon the doing of business in the United States by any corporation or joint stock company):

"We proceed to consider whether * * * the statute is constitutional.

"It is contended that it is not; certainly so far as the tax is measured by the income of bonds nontaxable under federal statutes, and municipal and state bonds beyond the federal power of taxation. And so of real and personal estates, because as to such estates the tax is direct, and required to be apportioned according to population among the states. It is insisted that such must be the holding unless this court is prepared to reverse the income tax cases decided under the act of 1894. [28 Stat. at L. 509, chap. 349.] Pollock v. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. 673, s. c. 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. 912.

"The applicable provisions of the Constitution of the United States in this connection are found in article 1, § 8, clause 1, and in article 1, § 2, clause 3, and article 1, § 9, clause 4. They are respectively:

" 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.'

" 'Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers.'

" 'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.'

"It was under the latter requirement as to apportionment of direct taxes according to population that this court in the Pollock

Case held the statute of 1894 to be unconstitutional. Upon the rehearing of the case Mr. Chief Justice Fuller, who spoke for the court, summarizing the effect of the decision, said: 'We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.' 158 U. S. 635.

"And as to excise taxes, the chief justice said: 'We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations." (Page 637.)

"The Pollock Case was before this court in Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. 747. In that case this court sustained an excise tax upon the transmission of property by inheritance. It was contended there, as here, that the case was ruled by the Pollock Case, and of that case this court, speaking by the present chief justice, said:

" 'The issue presented in the Pollock Case was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the previous adjudications of this court had settled nothing to the contrary.

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" 'Undoubtedly, in the course of the opinion in the Pollock Case, it was said that if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, *because imposed upon property solely by reason of its ownership,* could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, that it has ever been treated

as a duty or excise, because of the particular occasion which gives rise to its levy.

* * * * * * * *

"'Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons *solely because of their general ownership of property* from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.'

"The same view was taken of the Pollock Case in the subsequent case of Spreckels Sugar Ref. Co. v. McClain [192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.]

"The act now under consideration does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under article 1, § 8, clause 1 of the Constitution, and described generally as taxes, duties, imposts, and excises, upon which the limitation is that they shall be uniform throughout the United States.

"Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

"It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise.' It has been the subject-matter of considerable discussion,—the terms duties, imposts, and excises are generally treated as embracing the indirect forms

of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the Pollock Case, supra: 'Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts, and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.' [157 U. S. 557.]

"And in the same connection the chief justice, delivering the opinion of the court in Thomas v. United States, 192 U. S. 363, 48 L. Ed. 481, 24 Sup. Ct. 305, in speaking of the words 'duties,' 'imposts,' and 'excises,' said; 'We think that they were used comprehensively, to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.'

"Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. (7th Ed.) 680.

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable.

"If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population. Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95; Springer v. United States, 102 U. S. 586, 26 L. Ed. 253; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496, 24 Sup. Ct. 376."

## In re RAPIER.

(Supreme Court of the United States, 1892. 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93.)

[Petitions for habeas corpus for discharge from arrest under indictments charging the mailing of a newspaper and a letter in violation of the federal Anti-Lottery Act (Act Cong. Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2659]), which forbade the mailing, carriage, or delivery by mail of any matter concerning lotteries.]

Mr. Chief Justice FULLER. * * * The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by [26 Stat. 465, c. 908]. In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, it was held that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in Jackson's Case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power, and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were intrusted, and that, in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true; but, while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The states, before the Union was formed, could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-

offices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between mala prohibita and mala in se, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as mala in se, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged, within the intent and meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all. * * *

Writs denied.

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UNITED STATES v. GETTYSBURG ELECTRIC RY. CO. (1896) 160 U. S. 668, 681–683, 16 Sup. Ct. 427, 40 L. Ed. 576, Mr. Justice PECKHAM (upholding an act of Congress authorizing the taking by eminent domain of the battlefield of Gettysburg in the state of Pennsylvania):

"In our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it

is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war, and to create and equip armies and navies. It has the great power of taxation, to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by Congress, must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 421, 4 L. Ed. 579, in these words: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional.'

"The end to be attained, by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery, and, indeed, heroism, displayed by both the contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon

the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with, and springs from, the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored.

"No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred."

## III. Commercial Powers [7]

### GIBBONS v. OGDEN.

(Supreme Court of United States, 1824. 9 Wheat. 1, 6 L. Ed. 23.)

[Error to the Court for Trial of Impeachments and Correction of Errors of New York. A New York statute granted to Livingston and Fulton the exclusive right to navigate the waters of the state by steamboats for a period of years, and by assignment Ogden secured the right to navigate between New York City and places in New Jersey. Ogden secured an injunction in the state court against the violation of this right by Gibbons, who was using, in navigation between New York and New Jersey, two steamboats enrolled and licensed in the coasting trade under the act of Congress of 1793 (1 Stat. 305, c. 8). From an affirmance of this decree the case was brought here.]

Mr. Chief Justice MARSHALL. The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the Constitution and laws of the United States. * * * The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. . The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, —it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring

[7] For discussion of principles, see Black, Const. Law (3d Ed.) § 105.

that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port.

In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. * * *

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary-line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the

external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.

This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between [Boston] and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of

Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. * * * The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of Congress to regulate commerce with foreign nations, and among the several states, be coextensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are

accustomed to see it placed, for different purposes in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while Congress is regulating it? * * *

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all which can be most advantageously exer-

cised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to Congress, and consequently they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states, —may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. If Congress license vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, or to act directly on its system of police. So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other. * * *

It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing.

That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. * * *

It has been said that the Constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. * * *

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. * * * The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. * * *

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which Congress may regulate. If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing.

* * * [The law of New York was held to be inconsistent with the license granted by act of Congress.]

Judgment reversed.

[JOHNSON, J., concurred upon the ground that the power of Congress to regulate commerce was exclusive, and that the licensing act did not affect the case.]

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PAUL v. VIRGINIA (1869) 8 Wall. 168, 182–185, 19 L. Ed. 357, Mr. Justice FIELD (upholding a Virginia statute requiring foreign fire insurance companies to take out licenses before doing business in the state):

"We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * * The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

"There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

"In Nathan v. Louisiana, 8 How. 73 [12 L. Ed. 992], this court held that a law of that state imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of

foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. 'The individual thus using his money and credit,' said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.' And the opinion shows that, although instruments of commerce, they are the subjects of state regulation, and, inferentially, that they may be subjects of direct state taxation. * * *

"If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."

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INTERNATIONAL TEXT-BOOK CO. v. PIGG (1910) 217 U. S. 91, 106, 107, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, Mr. Justice HARLAN (holding invalid, as applied to plaintiff corporation, a Kansas statute forbidding foreign corporations to do business in the state until they had filed a detailed statement concerning their business and stockholders, and disabling foreign corporations doing business in the state from suing in the state courts until they had a certificate that this statement had been properly made. Plaintiff was a Pennsylvania corporation giving instruction by correspondence in Kansas, where it employed a permanent solicitor and collector, and its right to sue a defaulting student had been denied by the Kansas courts under this statute):

"It is true that the business in which the International Text-Book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-Book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-Book Company and its scholars—involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar in pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states,—particularly when it is in ex-

ecution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph,—'a new species of commerce,' to use the words of this court in Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1, 9, 24 L. Ed. 708, 710. In the great case of Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23, 68, this court, speaking by Chief Justice Marshall, said: 'Commerce, undoubtedly, is traffic; but it is something more; it is intercourse.' Referring to the constitutional power of Congress to regulate commerce among the states and with foreign countries, this court said in the Pensacola Case, just cited, that 'it is not only the right, but the duty, of Congress, to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.' This principle has never been modified by any subsequent decision of this court.

"The same thought was expressed in Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 356, 30 L. Ed. 1187, 1188, 1 Inters. Com. Rep. 306, 307, 7 Sup. Ct. Rep. 1126, 1127, where the court said: 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence.' It was said in the circuit court of appeals for the eighth circuit, speaking by Judge Sanborn, in Butler Bros. Shoe Co. v. United States Rubber Co., 84 C. C. A. 167, 183, 156 Fed. 1, 17, that 'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case, we shall therefore assume that the business of the Text-Book Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

[MOODY, J., approved the decision. FULLER, C. J., and MCKENNA, J., dissented.]

## COOLEY v. BOARD OF WARDENS OF PHILADELPHIA.

(Supreme Court of United States, 1851. 12 How. 299, 13 L. Ed. 996.)

[Error to the Supreme Court of Pennsylvania. A state statute required vessels with certain exceptions, to receive pilots for entering or leaving the port of Philadelphia, and those who did not were required to pay half-pilotage to the use of the Society for the Relief of Decayed Pilots. A suit against Cooley to recover such half-pilotage was decided for the plaintiff in the state courts.]

Mr. Justice CURTIS. * * * [After holding that the regulation did not impose duties on imports, exports, or tonnage, or give a preference to the ports of one state over those of another:] It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have been from time to time added to and changed, and we are not aware that their validity has been questioned. * * *

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, respectively, wherein such pilots may be, or with such laws as the states may respectively hereafter

enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the state which enacted them. But the law on which these actions are founded, was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power. And yet this act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did per se deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the states. If it were conceded on the one side that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence

of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution ("Federalist," No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. Sturges v. Crowninshield, 4 Wheat. 193, 4 L. Ed. 529; Houston v. Moore, 5 Wheat. 1, 5 L. Ed. 19; Willson v. Blackbird Creek Co., 2 Pet. 251, 7 L. Ed. 412.

The diversities of opinion, therefore, which have existed on this subject have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789, as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being

held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular sub-

ject in the state in which the legislation of Congress has left it. We go no further. * * *

Judgment affirmed.

[McLean and Wayne, JJ., dissented, and Daniel, J., concurred for other reasons.]

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THE DANIEL BALL (1871) 10 Wall. 557, 563–566, 19 L. Ed. 999, Mr. Justice Field (holding Grand river, flowing into Lake Michigan after a course wholly within the state of Michigan, to be a "navigable water of the United States," within a statute requiring steamers upon such waters to have federal licenses; and upholding the requirement of a federal license for a steamer of 123 tons plying upon it between points in Michigan and so constructed as to be incapable of navigating Lake Michigan):

"Upon [this] question we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. The Genesee Chief, 12 How. 457, 13 L. Ed. 1058; Hine v. Trevor, 4 Wall. 555, 18 L. Ed. 451. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

"If we apply this test to Grand river, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing

a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other states and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

"That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. 'The power to regulate commerce,' this court said in Gilman v. Philadelphia, 3 Wall. 724, 18 L. Ed. 96, 'comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress.'"

"But it is contended that the steamer 'Daniel Ball' was only engaged in the internal commerce of the state of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand river is a navigable water of the United States. * * *

"There is undoubtedly an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce 'among the several states,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states. Gibbons v. Ogden, 9 Wheat. 194, 195, 6 L. Ed. 23. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river, goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels of railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states,

and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

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## SMITH v. ST. LOUIS & S. W. RY. CO.

(Supreme Court of United States, 1901. 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847.)

[Error to the Court of Civil Appeals of Texas. The Texas live-stock sanitary commission was authorized by law to establish quarantine and sanitary regulations for the protection of domestic stock. It was made their duty to investigate stock diseases alleged to exist and to adopt preventive measures. In June, 1897, the commission recited that it had reason to believe that anthrax had broken out in Louisiana or was liable to do so, and recommended that

until after November 15, 1897, no cattle, horses, or mules be transported thence into Texas. The governor proclaimed this regulation. Plaintiff sued defendant railway for a consequent failure to deliver to him in Texas cattle shipped from Louisiana. The Court of Civil Appeals gave judgment for the defendant.]

Mr. Justice McKenna. * * * To what extent the police power of the state may be exerted on traffic and intercourse with the state, without conflicting with the commerce clause of the Constitution of the United States, has not been precisely defined. In the case of Henderson v. New York, 92 U. S. 259, sub nom. Henderson v. Wickham, 23 L. Ed. 543, it was held that the statute of the state, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the state, required shipowners to pay a fixed sum for each passenger,—that is, to pay for all passengers,—not limiting the payment to those who might actually become such charge,—was void. Whether the statute would have been valid if so limited was not decided.

In Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550, a statute declaring the same purpose as the New York statute, and apparently directed against persons mentally and physically infirm, and against convicted criminals and immoral women, was also declared void, because it imposed conditions on all passengers, and invested a discretion in officers which could be exercised against all passengers. The court, by Mr. Justice Miller, said:

"We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that object alone shall, in a proper controversy, come before us, it will be time enough to decide that question."

In Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, a statute of Missouri which provided that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state between the 1st day of March and the 1st day of November in each year, by any person or persons whatsoever," was held to be in conflict with the clause of the Constitution which gives to Congress the power to regulate interstate commerce.

The case was an action for damages against the railroad company for bringing cattle into the state in violation of the act. A distinction was made between a proper and an improper exertion of the police power of the state. The former was confined to the prohibition of actually infected or diseased cattle and to regulations

not transcending such prohibition. The statute was held not to be so confined, and hence was declared invalid. * * *

In Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. 757, some prior cases were reviewed, and the court, speaking by Mr. Justice Peckham, said:

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455, 3 Interst. Com. R. 185, 10 Sup. Ct. 862, it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state, if the inspection prescribed were of such a character, or if it were burdened with such conditions, as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862, 3 Interst. Com. R. 485, 11 Sup. Ct. 213; and in Scott v. Donald, 165 U. S. 58, 97, 41 L. Ed. 632, 644, 17 Sup. Ct. 265."

The exclusion in the case at bar is not as complete as in the cited cases. That, however, makes no difference if it is within their principle; and their principle does not depend upon the number of states which are embraced in the exclusion. It depends upon whether the police power of the state has been exerted beyond its province,—exerted to regulate interstate commerce,—exerted to exclude, without discrimination, the good and the bad, the healthy and the diseased, and to an extent *beyond what is necessary for any proper quarantine*. The words in italics express an important qualification. The prevention of disease is the essence of a quarantine law. Such law is directed, not only to the actually diseased, but to what has become exposed to disease. In Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. 1114, the quarantine system of Louisiana was sustained. It established a quarantine below New Orleans, provided health officers and inspection officers, and fees for them, to be paid by the ships detained and inspected. The system was held to be a proper exercise of the police power of the state for the protection of health, though some of its rules amounted to regulations of commerce with foreign nations and among the states. In Kimmish v. Ball, 129 U. S. 217, 32 L. Ed. 695, 2 Interst. Com. R. 407, 9 Sup. Ct. 277, certain sections of the laws of Iowa were passed on. One of them imposed a penalty upon any person who should

bring into the state any Texas cattle, unless they had been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas; or should have in his possession any Texas cattle between the 1st day of November and the 1st day of April following. Another section made any person having in his possession such cattle liable for any damages which might accrue from allowing them to run at large, "and thereby spreading the disease among other cattle, known as the Texas fever," and there was, besides, criminal punishment. The court did not pass upon the 1st section. In commenting upon the 2d some pertinent remarks were made on the facts which justified the statute, and the case of Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, was explained. It was said that the case "interpreted the law of Missouri as saying to all transportation companies: 'You shall not bring into the state any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Page 473, L. Ed. 531. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. Page 472, L. Ed. 530. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the state by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised."

In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488, the Husen Case was again commented upon, and what the law of Missouri was and was not was again declared. A statute of Kansas, however, which made any person who shall drive or ship into the state "any cattle liable or capable of communicating Texas, splenetic or Spanish fever to any domestic cattle of this state shall be liable * * * for * * * damages," was held not to be a regulation of commerce. It was also held that the statute was not repugnant to the act of Congress of May 29, 1884

(23 Stat. at L. 31, chap. 60 [U. S. Comp. St. 1901, p. 299]), known as the Animal Industry Act.

What, however, is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained. Henderson v. New York, 92 U. S. 259, sub nom. Henderson v. Wickham, 23 L. Ed. 543, and Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550. But we are not now put to any inquiry of that kind. The good faith and sincerity of the Texas officers cannot be doubted, and the statutes under which they acted cannot be justifiably complained of. The regulations prescribed are complained of, but are they not reasonably adaptive to the purpose of the statutes,—not in excess of it? Quarantine regulations cannot be the same for cattle as for persons, and must vary with the nature of the disease to be defended against. As the court of civil appeals said: "The necessities of such cases often require prompt action. If too long delayed the end to be attained by the exercise of the power to declare a quarantine may be defeated and irreparable injury done."

It is urged that it does not appear that the action of the live-stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right, which he seems to think cannot depend upon any circumstances, or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in Kimmish v. Ball, 129 U. S. 217, 32 L. Ed. 695, 2 Interst. Com. R. 407, 9 Sup. Ct. 277. But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome, and the remarks of the court of civil appeals become pertinent:

"The facts in this case are not disputed. The plaintiff sues as for a conversion, because of a refusal to deliver his cattle at Fort Worth. It is necessary to his recovery that he show that it was the legal duty of the defendant company to make such delivery. It is for the breach of this alleged duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the sanitary commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into.

So far as the record shows, every animal of the kind prohibited in the state of Louisiana may have been actually affected with charbon or anthrax; and it is conceded that this is a disease different from Texas or splenetic fever, and that it is contagious and infectious and of the most virulent character."

Judgment affirmed.

[HARLAN and BROWN, JJ., gave dissenting opinions, with the former of which WHITE, J., concurred.]

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## WABASH, ST. L. & P. RY. CO. v. ILLINOIS.

(Supreme Court of United States, 1886. 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.)

[Error to the Supreme Court of Illinois. An Illinois statute penalized unjust discriminations practiced by railroads against shippers, and enacted that charging the same or a greater amount of toll for any transportation within the state than was charged for like transportation over a greater distance on the same road should be prima facie evidence of such discrimination. The defendant railroad charged fifteen cents a hundred pounds for carrying carload lots of certain goods from Peoria, Illinois, to New York City, and twenty-five cents a hundred for a similar carriage from Gilman, Illinois, to New York, although Peoria was 86 miles further from New York. The Illinois Supreme Court sustained a suit against the railroad for this act, and this writ was taken.]

Mr. Justice MILLER. * * * The Supreme Court of Illinois in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois railroad company was the compensation for the entire transportation from the point of departure in the state of Illinois to the city of New York, holds that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the state, it is binding and effectual as to so much of the transportation as was within the limits of the state of Illinois (People v. Wabash, St. L. & P. R. Co., 104 Ill. 476); and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the state of Illinois violate the statute of the state on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton.

The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. * * *

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively state commerce, but, conceding that it may be a case of commerce among the states, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a state until Congress shall have exercised its power on that subject. * * * [Here follow quotations from Munn v. Illinois, 94 U. S. 113, 135, 24 L. Ed. 77; C., B. & Q. Ry. v. Iowa, 94 U. S. 155, 163, 24 L. Ed. 94; and Peik v. Chic. & N. W. Ry., 94 U. S. 164, 177, 178, 24 L. Ed. 97.] These extracts show that the question of the right of the state to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states, in the absence of any legislation by Congress on the same subject. By the slightest attention to the matter, it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a state for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depends upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen states, through which they are carried without change of car or breaking bulk. * * *

It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. * * * It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transporta-

tion. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges. * * *

It is impossible to see any distinction, in its effect upon commerce of either class, between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation; and, in fact, the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax, in effect, upon the privilege of carrying the goods through the state. It is also very difficult to believe that the court consciously intended to overrule the first of these cases without any reference to it in the opinion.

At the very next term of the court after the delivery of these opinions the case of Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547, was decided, in which the same point was considered, in reference to a statute of the state of Louisiana which attempted to regulate the carriage of passengers upon railroads, steam-boats, and other public conveyances, and which provided that no regulations of any companies engaged in that business should make any discrimination on account of race or color. * * * [Here follows a quotation from this case, pointing out that the Louisiana law necessarily affected the conduct of the carrier's business outside of the state as well as in it, and concluding:] "If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments."

The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage,—as much so as that of the steam-boat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation; and, in language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other

incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted." It cannot be too strongly insisted upon that the right of continuous transportation, from one end of the country to the other, is essential, in modern times, to that freedom of commerce from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the states, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. Cook v. Pennsylvania, 97 U. S. 574, 24 L. Ed. 1015; Brown v. Maryland, 12 Wheat. 446, 6 L. Ed. 678. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce. * * *

We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other

places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per hundred pounds, he is not permitted to do so, because the Illinois railroad company has already charged at the rate of 25 cents per hundred pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria. So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per hundred pounds for a car-load, but is compelled to pay at the rate of 25 cents per hundred pounds, because the railroad company has received from a person residing at Gilman 25 cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the states, when applied to transportation which includes Illinois in a long line of carriage through several states, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it certainly is the province of the state Legislature to determine that question; but when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states, and upon the transit of goods through those states, cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have

demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character; and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

Judgment reversed.

[BRADLEY, J., gave a dissenting opinion, in which concurred WAITE, C. J., and GRAY, J.]

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LUXTON v. NORTH RIVER BRIDGE CO. (1894) 153 U. S. 525, 529, 530, 533, 534, 14 Sup. Ct. 891, 38 L. Ed. 808, Mr. Justice GRAY (upholding a federal statute incorporating a bridge company authorized to build a bridge across the Hudson river between New York and New Jersey and to take land therefor by eminent domain):

"The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall: 'The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.' Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. McCulloch v. Maryland, 4 Wheat. 316, 411, 422, 4 L. Ed. 579; Osborn v. Bank, 9 Wheat. 738, 861, 873, 6 L. Ed. 204; Pacific Railroad Removal Cases, 115 U. S. 1, 18, 5 Sup. Ct. 1113, 29 L. Ed. 319; California v. Central Pac. R. Co., 127 U. S. 1, 39, 8 Sup. Ct. 1073, 32 L. Ed. 150. Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See Indiana v. U. S., 148 U. S. 148, 13 Sup. Ct. 564, 37 L. Ed. 401. And whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain, and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie. Van Brocklin v. Tennessee, 117 U. S. 151, 154, 6 Sup. Ct. 670, 29 L. Ed.

845, and cases cited; Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 656, 10 Sup. Ct. 965, 34 L. Ed. 295.

"From these premises, the conclusion appears to be inevitable that, although Congress may, if it sees fit, and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare, Const. Law, 248, 249. See Acts of July 14, 1862, c. 167 (12 Stat. 569); February 17, 1865, c. 38 (13 Stat. 431); July 25, 1866, c. 246 (14 Stat. 244); March 3, 1871, c. 121, § 5 (16 Stat. 572, 573); June 16, 1886, c. 417 (24 Stat. 78). * * *

"In California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several states, to authorize corporations to construct railroads across the states as well as the territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the acts of Congress establishing corporations to build railroads across the continent, said: 'It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as ter-

ritories, and employing the agency of state as well as federal corporations.' 127 U. S. 39, 40, 8 Sup. Ct. 1073, 32 L. Ed. 150.
* * *

"In the light of the foregoing principles and authorities, the objection made to the constitutionality of this act cannot be sustained."

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SOUTHERN RY. CO. v. UNITED STATES (1911) 222 U. S. 20, 26, 27, 32 Sup. Ct. 2, 56 L. Ed. 72, Mr. Justice VAN DEVANTER (upholding the imposition of a penalty upon defendant company for hauling upon its interstate railroad in intrastate traffic three cars not equipped with safety couplers as required by the federal Safety Appliance Act of 1893 as amended in 1903 [27 Stat. 531, c. 196, U. S. Comp. St. 1901, p. 3174; 32 Stat. 943, c. 976, U. S. Comp. St. Supp. 1911, p. 1314]):

"It must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such

an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employés, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."

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## SECOND EMPLOYERS' LIABILITY CASES.

(Supreme Court of United States, 1912. 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44.)

[Error to the Supreme Court of Connecticut and to the United States Circuit Courts for the Districts of Minnesota and of Massachusetts. The three cases were suits against railroads for personal injuries to employés, brought under the federal Employers' Liability Act of 1908 (35 Stat. 65, c. 149, U. S. Comp. St. Supp. 1911, p. 1322), which declared that "every common carrier by railroad, while engaging in commerce between any of the several states or territories, * * * shall be liable in damages [for injury or death suffered by any person] while he is employed by such carrier in such commerce, * * * such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Beneficiaries of the action were designated in case of death, and provision was made for survival of the action to designated persons. The defenses of fellow service, contributory negligence, and assumed risk were abrogated or modified, as indicat-

ed in the opinion below. The Connecticut court declared the act invalid and the other two courts upheld it.]

Mr. Justice VAN DEVANTER. * * * Some propositions bearing upon the extent and nature of [the federal] power [to regulate commerce] have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several states" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. "To regulate," in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employés.

6. The duties of common carriers in respect of the safety of their employés, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power. [Citing cases.]

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the com-

merce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employés, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employés are engaged.

We come, then, to inquire whether Congress has exceeded its power in that regard by prescribing the regulations embodied in the present act. It is objected that it has, (1) because the abrogation of the fellow-servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk,[8] have no tendency to promote the safety of the employés, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employé through the negligence of another, although confined to instances where the injured employé is engaged in interstate commerce, is not confined to instances where both employés are so engaged. * * *

Of the objection to these changes it is enough to observe: * *

Second. The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employés and to advance

[8] These defenses were entirely abrogated where the employer's violation of a safety statute contributed to the injury, and in other cases the defense of contributory negligence was displaced by the rule of "comparative negligence."

the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution. Lottery Case (Champion v. Ames) 188 U. S. 321, 353, 355, 47 L. Ed. 492, 500, 501, 23 Sup. Ct. 321; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 203, 55 L. Ed. 167, 181, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. 164.

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 581, 582, 22 L. Ed. 654, 664; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 379, 37 L. Ed. 772, 777, 778, 13 Sup. Ct. 914.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employé is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in Southern R. Co. v. United States, 222 U. S. 20, 27, 56 L. Ed. 72, 32 Sup. Ct. 2, that power is plenary, and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present act, unlike the one condemned in Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employés while engaged in such commerce. And this being so, it is not a valid objection that the act embraces instances where the causal negligence is that of an employé engaged in intrastate commerce; for such negligence, when operating injuriously upon an employé engaged in interstate commerce, has the same effect upon that commerce as if the negligent employé were also engaged therein. * * *

Judgments affirmed or reversed accordingly.

## LOTTERY CASE.

(Supreme Court of United States, 1903. 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492.)

[Appeal from the United States Circuit Court for the Northern District of Illinois. A federal statute of 1895 (28 Stat. 963, c. 191 [U. S. Comp. St. 1901, p. 3178]) criminally forbade any one to cause to be brought into the United States for the purpose of disposing of the same, or to be deposited in the mails, or to be carried from one state to another, any lottery tickets or advertisements thereof. One Champion was arrested in Chicago charged with conspiracy to violate the above act, and in pursuance thereof with having caused the Wells-Fargo Express Company to carry lottery tickets in a South American lottery from Texas to California. His writ of habeas corpus based upon the alleged invalidity of the above act was dismissed by the Circuit Court.]

Mr. Justice HARLAN: * * * What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the states? * * * [Here are discussed, among other cases, Gibbons v. Ogden, ante, p. 109; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1, 24 L. Ed. 708; Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; and Hanley v. K. C. Ry., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.]

The cases cited sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opin-

ion, such regulations may not be the best or most effective that could be employed. * * *

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. * * * These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. * * * We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that * * * the authority given Congress was not to *prohibit,* but only to *regulate.* * * *

We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from state to state is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce,* is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2d, 1895, to suppress cannot be overlooked. * * *

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instru-

ment can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. * * * But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the tenth amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. * * *

We know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the coun-

try at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right. * * *

[After discussing Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; Addyston Pipe Co. v. U. S., 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; and Re Rahrer, post, p. 184, as involving the validity of the regulation of commerce by prohibition:] It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution.[9] This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. * * * We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or

[9] See Monongahela Navig. Co. v. United States, ante, p. 94.

restriction imposed upon the exercise of the powers granted to Congress.

Judgment affirmed.

Mr. Chief Justice FULLER, dissenting [with whom concurred BREWER, SHIRAS, and PECKHAM, JJ., on the ground that lottery tickets were not articles of commerce nor injurious to such commerce]: * * * An invitation to dine, or take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the states all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government. * * *

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## GILMAN v. PHILADELPHIA.

(Supreme Court of United States, 1866. 3 Wall. 713, 18 L. Ed. 96.)

[Appeal from the United States Circuit Court for the Eastern District of Pennsylvania. Under state authority, Philadelphia was about to construct a bridge across the Schuylkill river, a navigable tidal stream running through the city, and wholly within Pennsylvania. It was to be 30 feet high, without draws, and vessels with masts could not pass it. Gilman of New Hampshire owned coal wharves just above the proposed bridge, access to which would be seriously impaired by the bridge, and he sought an injunction against its construction, which was denied by the lower court.]

Mr. Justice SWAYNE. * * * Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

A license under the act of 1793, to engage in the coasting trade, carries with it right and authority. "Commerce among the states" does not stop at a state line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever "commerce among the states" goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights. There can be no doubt that the coasting trade may be carried on beyond where the bridge in question is to be built.

We will now turn our attention to the rights and powers of the states which are to be considered. The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal Constitution. It has not been taken from the states. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. * * * The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states. Whether the power in any given case is vested exclusively in the general government depends upon the nature of the subject to be regulated. * * *

The most important authority, in its application to the case before us, is Willson v. Blackbird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412 [holding Delaware might authorize the damming of a navigable tidal creek within its borders, as against a vessel licensed to navigate by the United States]. * * * This opinion came from the same "expounder of the Constitution" who delivered the earlier and more elaborate judgment in Gibbons v. Ogden. We are not aware that the soundness of the principle upon which the court proceeded has been questioned in any later case. We can see no difference in principle between that case and the one before us. Both streams are affluents of the same large river. Each is entirely within the state which authorized the obstruction. The dissimilarities are in facts which do not affect the legal question. Blackbird creek is the less important water, but it had been navigable, and the obstruction was complete. If the Schuylkill is larger and its commerce greater, on the other hand, the obstruction will be only partial and the public convenience, to be promoted, is more imperative. In neither case is a law of Congress forbidding the obstruction an element to be considered. The point that the vessel

was enrolled and licensed for the coasting trade was relied upon in that case by the counsel for the defendant. The court was silent upon the subject. A distinct denial of its materiality would not have been more significant. It seems to have been deemed of too little consequence to require notice. Without overruling the authority of that adjudication we cannot, by our judgment, annul the law of Pennsylvania.

It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the state shall be exerted within the sphere of the commercial power which belongs to the nation.

The states may exercise concurrent or independent power in all cases but three: 1. Where the power is lodged exclusively in the federal Constitution. 2. Where it is given to the United States and prohibited to the states. 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively. The power here in question does not, in our judgment, fall within either of these exceptions. * * *

Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. * * *

The defendants are proceeding in no wanton or aggressive spirit. The authority upon which they rely was given, and afterwards deliberately renewed by the state. The case stands before us as if the parties were the state of Pennsylvania and the United States. The river, being wholly within her limits, we cannot say the state has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith cannot be made the subject of review by this court. * * *

Decree affirmed.

[CLIFFORD, J., gave a dissenting opinion, in which concurred WAYNE and DAVIS, JJ.]

## NORTHERN SECURITIES CO. v. UNITED STATES.

(Supreme Court of United States, 1904. 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.)

[Appeal from the United States Circuit Court for Minnesota. A federal statute of 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], the "Sherman Anti-Trust Act") declared criminally illegal (§ 1) "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations"; punished (§ 2) "every person who shall monopolize, or attempt to monopolize, or combine or conspire * * * to monopolize" any part of said trade or commerce; and (§ 4) authorized governmental proceedings in equity to restrain violations of the act. The Northern Pacific and Great Northern Railroad Companies, owning parallel and competing systems about 9,000 miles in length between the Great Lakes and Puget Sound, in 1901 purchased most of the stock of the Burlington Railroad, a connecting system 8,000 miles long, giving their bonds therefor; and James J. Hill, with associate stockholders of the Great Northern road, and J. P. Morgan, with associate stockholders of the Northern Pacific, entered into a combination to form a New Jersey corporation to hold the stock of their two railroads, shares in the holding corporation to be exchanged at an agreed valuation for shares in the railroads. Pursuant thereto, the Northern Securities Company was formed and became the holder of over three-fourths of the stock of each of the two railroads. The United States filed a bill in equity under the above Anti-Trust law against the three corporations and the principal individuals concerned in this transaction, and obtained a decree forbidding the Securities Company from voting or receiving dividends upon any stock of the railroad companies, or of exercising any control over their acts, but permitting a retransfer of the railroad stocks to holders of Securities Company stock issued therefor.]

Mr. Justice HARLAN. * * * [After summarizing the facts as above:] Necessarily the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease. * * * No scheme or device could more certainly come within the words of the act,—"combination in the form of a trust or otherwise * * * in restraint of commerce among the several states or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This

combination is, within the meaning of the act a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. * * *

How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the states or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress? * * *

[After summarizing the results of previous decisions under the Anti-Trust Act:] In this connection, it is suggested that the contention of the government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce if that corporation be engaged in interstate commerce. * * * We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of—indeed, all that it complains of here—is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? * * *

Even if the state allowed consolidation, it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce,* could law-

fully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the states and with foreign nations. * * *

When Congress declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several states when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive, but they show the circumstances under which the Anti-Trust Act was passed. * * *

[After citing various state decisions upholding local anti-trust statutes:] The cases just cited, it is true, relate to the domestic commerce of the states. But they serve to show the authority which the states possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in Gibbons v. Ogden, 9 Wheat. 197, 6 L. Ed. 70,—a principle never modified by any subsequent decision,—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." Is there, then any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce? If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it? * * *

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the states and with foreign states by declaring illegal all contracts, combinations, conspiracies, or

monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. * * *

The suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the states, in violation of an act of Congress, is hostile to the reserved rights of the states. The federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. * * * Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the states. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. * * *

So far as the Constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind,—domestic, interstate, and international. * * * But neither a state corporation nor its stockholders can, by reason of the nonaction of the state or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the states or with foreign nations. * * * Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* * * *

Decree affirmed.[10]

[10] In an omitted portion of his opinion (193 U. S. 354, 24 Sup. Ct. 436, 48 L. Ed. 679), Harlan, J., stated that the Northern Securities Company was not a real purchaser or owner of the stock, but merely a custodian to represent the combination of stockholders. In Harriman v. No. Secur. Co., 197 U. S. 244, 291, 25 Sup. Ct. 493, 503, 49 L. Ed. 739 (1905), the Securities Company was held to be an absolute owner; Fuller, C. J., saying, referring to the principal case: "For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce."

Mr. Justice BREWER, concurring. * * * [After stating that Congress could not deprive an individual of the right to purchase stock control of competing interstate railroads:] But no such investment by a single individual of his means is here presented. There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. * * *

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation, holding the majority of the stock in the Northern Securities Company, and acting in obedience to the wishes of a majority of its stockholders, would control the action of the Securities Company and through it the action of the two railroad companies; and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads; or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade. * * *

Mr. Justice WHITE [with whom concurred FULLER, C. J., and PECKHAM and HOLMES, JJ.] dissenting. * * * [Quoting from Gibbons v. Ogden, ante, p. 109:] "Commerce undoubtedly is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*" (Italics mine.)

I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the states or intercourse between them. * * * Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" * * * Can it in reason be maintained that to prescribe rules governing the ownership of stock within a state, in a corporation created by it, is within the power to prescribe rules for the regulation of intercourse between citizens of different states? * * *

If the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress,

it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. * * *

Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character, and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. * * *

The general governmental [power] to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government, restrained by law, and an absolute government, unrestrained by any of the principles which are necessary for the perpetuation of society, and the protection of life liberty, and property. * * *

[HOLMES, J., also gave an opinion, in which concurred the other dissenting justices.]

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## WELTON v. MISSOURI.

**(Supreme Court of United States, 1875. 91 U. S. 275, 23 L. Ed. 347.)**

[Error to the Supreme Court of Missouri. A statute required a license from all persons peddling in the state goods produced or manufactured elsewhere, but required no license for peddling domestic goods. Defendant was convicted of peddling, without a license, sewing machines made out of the state, and this was affirmed by the state Supreme Court.]

Mr. Justice FIELD. * * * The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the state; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license. * * *

So, in like manner, the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the state courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several states. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority.

It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. * * *

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the state or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by travelling dealers of goods which are the growth, product, or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. * * * It would be premature to state any rule which would be universal in its application to determine when the commercial power of the federal government over a commodity has ceased, and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri. * * *

Judgment reversed.

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## PHILADELPHIA & SOUTHERN MAIL S. S. CO. v. PENNSYLVANIA.

(Supreme Court of United States, 1887. 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.)

[Error to the Supreme Court of Pennsylvania. A state statute imposed a tax of $^{8}/_{10}$ per cent. upon the gross receipts of every transportation company incorporated by or doing business in the state. The Philadelphia, etc., S. S. Company, a Pennsylvania corporation, denied the validity of this tax, as to its receipts derived from transportation by sea between different states and to foreign countries. From a decision against it, this writ was taken.]

Mr. Justice BRADLEY. The question which underlies the immediate question in the case is whether the imposition of the tax upon the steam-ship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress. The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels, which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the state could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the state without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the states upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations

with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject-matter is national in its character, and properly admits of only one uniform system. See the cases collected in Robbins v. Shelby Taxing-Dist., 120 U. S. 489, 492, 493, 7 Sup. Ct. 592, 30 L. Ed. 694. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be based on a sound method of reasoning. * * * Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself. * * *

[After discussing the Case of the State Freight Tax, 15 Wall. 232, 21 L. Ed. 146, which held invalid, as applied to interstate traffic, a Pennsylvania tax of several cents a ton upon all freight carried in the state:] If this case stood alone, we should have no hesitation in saying that it would entirely govern the one before us; for, as before said, a tax upon fares and freights received for transportation is virtually a tax upon the transportation itself. But at the same time that the Case of State Freight Tax was decided [another case], that of State Tax on Railway Gross Receipts, was also decided, and the opinion was delivered by the same member of the court. 15 Wall. 284, 21 L. Ed. 164. * * * [This case involved a state tax of ¾ per cent. upon all the gross receipts of

transportation companies incorporated in Pennsylvania, payable semi-annually.] The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two:

First, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in Brown v. Maryland [12 Wheat. 419, 6 L. Ed. 678] to be taxable. This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them while in the original packages. * * * [Referring to Welton v. Missouri, ante, p. 155.] The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed, and caused to be accounted for by the company dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed, not only because they are money or its value, but because they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce or banking or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in Brown v. Maryland; but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted

to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce,—it would clearly be unconstitutional. * * * It was held by this court in the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, that interstate commerce carried on by corporations is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals. In that case [a Pennsylvania tax was held invalid which] was laid upon the capital stock of a ferry company incorporated by New Jersey, and engaged in the business of transporting passengers and freight between Camden, in New Jersey, and the city of Philadelphia. * * * It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was interstate commerce.

The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt, the capital stock of the former, regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state under the plea that they are exercising a franchise. * * *

Can the tax in this case be regarded as an income tax? And, if it can, does that make any difference as to its constitutionality? * * * Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations, this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. * * * It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. * * * The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but, in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, interstate or

foreign commerce, or any other matter exclusively within the jurisdiction of the federal government. * * *

Judgment reversed.

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## ALLEN v. PULLMAN'S PALACE CAR COMPANY.

(Supreme Court of United States, 1903. 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134.)

[Error to the Circuit Court of the United States for the Middle District of Tennessee. The Pullman Company sued Allen, the comptroller of Tennessee, to recover back taxes paid by it under protest for the years 1887 to 1893. From a judgment in its favor, Allen took this writ. The yearly gross receipts of the company from interstate business extending into the state were $500,000. The similar receipts from its purely local business in the state were $25,000. Other facts appear in the opinion.]

Mr. Justice DAY. The taxes in controversy were levied under certain revenue laws of the state of Tennessee. Those for the years 1887 and 1888 provided: "That the rate of taxation on the following privileges shall be as follows: Sleeping cars: Each company doing business in the state, on each car, per annum, $500." Section eight of the act provided: "That any and all parties, firms, or corporations exercising any of the foregoing privileges must pay this tax, as set forth in this act, for the exercise of such privilege, whether they make a business of it or not."

The Tennessee act of 1877, imposing a tax upon the running of sleeping cars, was before this court for consideration in the case of Pickard v. Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785, 6 Sup. Ct. 635. * * *

It was [there] held that the tax was a burden upon interstate commerce, and void because of the exclusive power of Congress to regulate commerce between the states. Unless the statute now under consideration can be distinguished from the one then construed, the Pickard Case is decisive of the present case. * * * In the act of 1877 the running and using of sleeping cars on railroads in the state, when the cars are not owned by the railroads upon which they are run, is declared to be a privilege. Under the act of 1887, the tax is specifically imposed upon a privilege. Under the act of 1877, the tax imposed was $50 for each car or coach used or run over the road. Under the act of 1887, each company doing business in the state is required to pay $500 per annum for the same privilege. The distinction, except in the amount of annual tax exacted, is without substantial difference. Under the earlier act the tax is required for the privilege of running and using sleeping cars on railroads not owning the cars. In the later act it is enacted for the privilege of doing business in the state. This business

consists of running sleeping cars upon railroads not owning the cars, and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are lines traversing the state, but not confined to its limits. The cars of the Pullman Company run into and beyond the state as well as between points within the state. The act in its terms applies to cars running through the state as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the state. There is no decision of the supreme court of Tennessee limiting the act in its operation to intrastate traffic. * * *

The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the legislature, in the terms of the act, impose upon the entire business of the company. We are of opinion that taxes exacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce.

Other considerations apply in the construction of the act of 1889, under which, or acts identical in terms, taxes were collected from 1889 to 1893, inclusive. It provides: "Sec. 4. The rate of taxation on the following privileges shall be as follows, per annum: * * * Sleeping car companies (in lieu of all other taxes except ad valorem tax) for one or more passengers taken up at one point in this state and delivered at another point in this state, and transported wholly within the state, per annum $3,000." Its terms apply strictly to business done in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein. It is not necessary to review the numerous cases in this court in which attempts by the states to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the state to tax and control the internal business of the state, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness. In the late case of Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586, 17 Sup. Ct. 215, Mr. Justice Peckham, speaking for the court, said: "It has never been held, however, that when the business of the company, which is wholly within the state, is but a mere incident

to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to, and is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the state statute."

Granting that the right exists whereby a state may impose privilege or license fees upon business carried on wholly within the state, it is argued that the tax of $3,000 per annum, collected for carrying one or more local passengers on cars operating within the state, is assessed upon traffic which bears such small proportion to the entire business of the company within the state that it could not have been levied in good faith upon purely local business, and is but a thinly disguised attempt to tax the privilege of interstate traffic. If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection. Upon this proposition we are unable to distinguish this case from Pullman Co. v. Adams, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit. It was urged that under the Constitution of Mississippi the Pullman Company was a common carrier, required to carry passengers; and therefore could not be taxed for the privilege of doing that which it was compelled to do; but in view of a decision of the supreme court of Mississippi, sustaining the tax, it was assumed that no such objection existed under the state Constitution. Speaking upon this subject, Mr. Justice Holmes, delivering the opinion of the court, said: "If the clause of the state Constitution referred to were held to impose the obligation supposed, and to be valid, we assume, without discussion, that the tax would be invalid. For then it would seem to be true that the state Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case

is governed by Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586, 17 Sup. Ct. 214. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax." * * *

[Under section 3046, Shannon's Tenn. Code, it was held that Tennessee had abrogated the common law rule requiring inn-keepers and passenger carriers to serve all, and that the Pullman Company was under no obligation to receive passengers in the state.]

It follows that a tax imposed upon domestic business, under the circumstances shown, cannot be a burden upon interstate commerce in such sense as will invalidate it. Under the judgment of the court below, the Pullman Company was permitted to recover for license taxes levied under both acts. In so far as it permitted a recovery for taxes under the act of 1889 and identical laws of other years, the judgment should be modified.

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## GALVESTON, H. & S. A. RY. CO. v. TEXAS.

(Supreme Court of United States, 1908. 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031.)

[Error to the Supreme Court of Texas. A state statute imposed upon each railroad, whose lines lay wholly within the state, an annual tax "equal to 1 per cent. of its gross receipts." In an action by the state to collect such taxes this statute was upheld by the state courts.]

Mr. Justice HOLMES. * * * The lines of the railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 1 Interst. Com. Rep. 308, 7 Sup. Ct. 1118. The counsel for the state rely upon Maine v. Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994, 3 Interst. Com. Rep. 807, 12 Sup. Ct. 121, 163, and maintain, if necessary, that the later overrules the earlier case.

In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. * * * In Maine v. Grand Trunk R. Co., supra, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the

majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 3 Interst. Com. Rep. 595, 11 Sup. Ct. 876), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. 305; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. Ed. 960, 17 Sup. Ct. 527; Fargo v. Hart, 193 U. S. 490, 499, 48 L. Ed. 761, 765, 24 Sup. Ct. 498. So it has been held that a tax on the property and business of a railroad operated within the state might be estimated prima facie by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229, 24 Sup. Ct. 107.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & M. R. Co. v. Powers, supra, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk R. Co. supra, "an annual excise tax for the privilege of exercising its franchise" was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by a number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile.

That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See Ficklen v. Taxing District, 145 U. S. 1, 23, 36 L. Ed. 601, 607, 4 Interst. Com. Rep. 79, 12 Sup. Ct. 810; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 697, 39 L. Ed. 311, 316, 5 Interst. Com. Rep. 1, 15 Sup. Ct. 268, 360; McHenry v. Alford, 168 U. S. 651, 670, 671, 42 L. Ed. 614, 621, 18 Sup. Ct. 242.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." Postal Teleg. Cable Co. v. Adams, supra. See New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 438, 439, 39 L. Ed. 1043, 1045, 1046, 15 Sup. Ct. 896. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard v. Morgan, 185 U. S. 27, 37, 46 L. Ed. 785, 794, 22 Sup. Ct. 576; Asbell v. Kansas, 209 U. S. 251, 254, 256, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax "equal to" 1 per cent. of gross receipts, and a tax of 1 per cent. of the same, seems to us nothing, except where

the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.

Judgment reversed.

[HARLAN, J., gave a dissenting opinion, in which concurred FULLER, C. J., and WHITE and MCKENNA, JJ.]

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## COE v. ERROL.

**(Supreme Court of United States, 1886. 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715.)**

[Error to the Supreme Court of New Hampshire. The Androscoggin river, from Maine into New Hampshire and back through Maine to the sea, had long been used as a public highway for the floatage of timber. Coe, a resident of Maine, had cut certain logs in Maine and floated them down the river on their way through New Hampshire to Lewiston, Maine. These logs were detained by low water at Errol, New Hampshire, for nearly a year, and while so detained were taxed by the town of Errol. Such detention by low water was in the usual course of such transportation. Other logs Coe had cut in New Hampshire and drawn to the shores of the river or placed in its tributaries in time of low water, waiting for the high water of next spring to carry them on to Lewiston. Errol also taxed these. Coe resisted the tax, and the Supreme Court of New Hampshire abated the tax on the logs cut in Maine but sustained that on the others.]

Mr. Justice BRADLEY. * * * The question for us to consider, therefore, is, whether the products of a state (in this case timber cut in its forests) are liable to be taxed like other property within the state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place of shipment, such products being owned by persons residing in another state. * * *

[After deciding that the non-residence of the owner does not render personal property non-taxable in the state where it is lo-

cated:] We recur, then, to a consideration of the question freed from this limitation: Are the products of a state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state? Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state.

Of course they cannot be taxed *as* exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such

an imposition would be a regulation of commerce among the states, and, therefore, void as an invasion of the exclusive power of Congress. See Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the state, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

The point of time when state jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the state, that it should be clearly defined so as to avoid all ambiguity or question. In regard to imports from foreign countries, it was settled in the case of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, that the state cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported; the right to sell without any restriction imposed by the state being a necessary incident of the right to import without such restriction. This rule was deemed to be the necessary result of the prohibitory clause of the Constitution, which declares that no state shall lay any imposts or duties on imports or exports. The law of Maryland, which was held to be repugnant to this clause, required the payment of a license tax by all importers before they were permitted to sell their goods. This law was also considered to be an infringement of the clause which gives to Congress the power to regulate commerce. This court, as before stated, has since held that goods transported from one state to another are not imports or exports within the meaning of the prohibitory clauses before referred to; and it has also held that such goods, having arrived at their place of destination, may be taxed in the state to which they are carried, if taxed in the same manner as other goods are taxed, and not by reason of their being brought into the state from another state, nor subjected in any way to un-

favorable discrimination. Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257.

But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes. Some of the Western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of The Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing.

The application of these principles to the present case is obvi-

ous. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the state of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the state of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable. But granting all this, it may still be pertinently asked, How can property thus situated, to wit, deposited or stored at the place of entrepôt for future exportation, be taxed in the regular way as part of the property of the state? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed, or assessed for taxation, in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its destination. If thus taxed, in the usual way that other similar property is taxed, and at the same rate, and subject to like conditions and regulations, the tax is valid. In other words, the right to tax the property being founded on the hypothesis that it is still a part of the general mass of property in the state, it must be treated in all respects as other property of the same kind is treated. * * *

Judgment affirmed.

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## ROBBINS v. SHELBY COUNTY TAXING DISTRICT.

**(Supreme Court of United States, 1887. 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.)**

[Error to the Supreme Court of Tennessee. A state statute required all drummers and persons not having a licensed house of business in the Taxing District (the city of Memphis), offering for sale goods by sample, to pay a license tax of $25 a month. Robbins was convicted of selling goods by sample without a license in Memphis, for a firm in Cincinnati, Ohio, and this was affirmed by the state supreme court.]

Mr. Justice BRADLEY. * * * The principal question argued before the supreme court of Tennessee was as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid. * * * Certain principles have been already established by the decisions of this court, which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily ex-

clusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299, 319, 13 L. Ed. 996, and was virtually involved in the case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, and has been confirmed in many subsequent cases. * * *

2. Another established doctrine of this court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in Gibbons v. Ogden, 9 Wheat. 1, 222, 6 L. Ed. 23, by Mr. Justice Grier in the Passenger Cases, 7 How. 283, 462, 12 L. Ed. 702, and has been affirmed in subsequent cases. State Freight Tax Cases, 15 Wall. 232, 279, 21 L. Ed. 146; Railroad Co. v. Husen, 95 U. S. 465, 469, 24 L. Ed. 527; Welton v. Missouri, 91 U. S. 275, 282, 23 L. Ed. 347; County of Mobile v. Kimball, 102 U. S. 691, 697, 26 L. Ed. 238; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Walling v. Michigan, 116 U. S. 446, 455, 6 Sup. Ct. 454, 29 L. Ed. 691; Pickard v. Pullman Palace Car Co., 117 U. S. 34, 6 Sup. Ct. 635, 29 L. Ed. 785; Wabash R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

3. It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce; such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States, and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce;

nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. For authorities on this last head it is only necessary to refer to those already cited. In a word, it may be said that, in the matter of interstate commerce, the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one state to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York, and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another state without first procuring an order for them. It is true, a merchant or manufacturer in one state may erect or hire a warehouse or store in another state, in which to place his goods, and await the chances of being able to sell them; but this would require a warehouse or store in every state with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other states than those in which they reside, and send their goods there to be kept on sale; but this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the

same kinds of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do, who wishes to sell his goods in other states? Must he sit still in his factory or warehouse, and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing or doing business in those other states. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly, and without due attention to the truth of things. It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the state. Besides, why could not the state to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way? The truth is, that in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant, visiting New Orleans or Jacksonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts.

But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent, but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution; and this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirements of a license, for

making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege, cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten in argument that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former, independent of the latter, and free from any interference or restraint from them. To deny to the state the power to lay the tax or require the license in question, will not, in any perceptible degree, diminish its resources, or its just power of taxation. It is very true that, if the goods when sold were in the state, and part of its general mass of property, they would be liable to taxation; but when brought into the state in consequence of the sale, they will be equally liable; so that, in the end, the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state, and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws: provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. Brown v. Houston, qua supra; Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of State Freight Tax Cases, 15 Wall. 232, 21 L. Ed. 146. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made,

is interstate commerce. A new Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by Congress alone. It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; while the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition; and in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it. If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of 40 different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation.

To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the state is not bound to tax its own drummers; and if it does so, while having no power to tax those of other states, it acts of its own free will, and is itself the author of such discriminations. As before said, the state may tax its own internal com-

merce; but that does not give it any right to tax interstate commerce.

Judgment reversed.

[WAITE, C. J., gave a dissenting opinion, in which concurred FIELD and GRAY, JJ. It proceeded upon the ground that there was no discrimination.]

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SOUTHERN RY. CO. v. KING (1910) 217 U. S. 524, 532–534, 536, 537, 30 Sup. Ct. 594–597, 54 L. Ed. 868, Mr. Justice DAY (upholding a Georgia statute requiring the speed of railroad trains to be checked at highway crossings):

"The rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of the public health and safety, have been maintained by the decisions of this court. We may instance some of the cases of this nature in which statutes have been held not to be a regulation of interstate commerce, although they may affect the transaction of such commerce among the states. In Smith v. Alabama, 124 U. S. 465, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. 564, it was held to be within the police power of the state to require locomotive engineers to be examined and licensed. In New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418, a law regulating the heating of passenger cars and requiring guard posts on bridges was sustained. * * * In Erb v. Morasch, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. 819, it was held that a municipal ordinance of Kansas City, Kansas, although applicable to interstate trains, which restricted the speed of all trains within the city limits to 6 miles an hour, was a valid exertion of the police power of the state. In the case of Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851, this court said:

" 'It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.' * * *

"Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect

upon interstate commerce. It is consistent with the former decisions of this court, and with a proper interpretation of constitutional rights, at least in the absence of congressional action upon the same subject-matter, for the state to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the state to enact. * * *

"The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

[HOLMES and WHITE, JJ., dissented in their interpretation of defendant's answer.]

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## LEISY v. HARDIN.

(Supreme Court of United States, 1890. 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.)

[Error to the Supreme Court of Iowa. Plaintiffs, brewers at Peoria, Illinois, transported into Iowa and there sold and offered for sale in the original packages (quarter barrels, eighth barrels, and sealed cases) a large quantity of beer. Defendant, a constable, acting under a general prohibition law of the state, seized the beer, and plaintiffs brought replevin to recover it. A judgment for plaintiffs in the lower court was reversed by the state Supreme Court.]

Mr. Chief Justice FULLER. The power vested in Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is the power to prescribe the

rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action. Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

The power to regulate commerce among the states is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. * * * Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; but where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley v. Board of Wardens, 12 How. 299, 13 L. Ed. 996. * * *

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must

be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled. County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Brown v. Houston, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; Railroad Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; Robbins v. Taxing Dist., 120 U. S. 489, 493, 7 Sup. Ct. 592, 30 L. Ed. 694.

That ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a state, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister state? or, when imported, prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?

In Brown v. Maryland, supra, * * * it was laid down * * * that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister state. Manifestly this must be so, for the same public policy applied to commerce among the states as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story, Const. § 1066. And although the precise question before us was not ruled in Gibbons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700 [holding Iowa unable to prohibit the carriage into it of liquor from other states. * * * Here follows a discussion of this case, and of the License Cases, 5 How. 504, 12 L. Ed. 256.]

The authority of Peirce v. New Hampshire [the License Cases], in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to. The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman v. Railway Co., 125 U. S. 507, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, "that * * * where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, Congress

can alone act upon it, and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise; or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. * * * [Here follows a discussion of a number of prior cases, some of which are printed ante, in this chapter.]

These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. * * *

Undoubtedly it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a state may properly adopt as appropriate or needful for the protection of the public morals, the public health, or the public safety; but, notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action. * * *

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in

Bowman v. Railway Co., supra, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. * * *

Judgment reversed.

[GRAY, J., gave a dissenting opinion, in which concurred HARLAN and BROWN, JJ., in the course of which occurred the paragraph:]

The silence and inaction of Congress upon the subject, during the long period since the decision of the License Cases, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court, rather than to warrant the presumption that Congress intended that commerce among the states should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the states.

## In re RAHRER.

(Supreme Court of United States, 1891. 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.)

[Appeal from the United States Circuit Court for the District of Kansas. On August 8, 1890, an act of Congress (the "Wilson Act") took effect providing that all intoxicating liquors shipped into any state or territory or remaining therein for use, sale, or storage, should, upon arrival therein, be subject to the laws of such state or territory, enacted in the exercise of its police powers, as though such liquor had been produced therein, and should not be exempt therefrom because introduced in original packages or otherwise. 26 Stat. 313, c. 728 (U. S. Comp. St. 1901, p. 3177). On August 9, 1890, Rahrer, an agent of liquor dealers in Missouri, sold in the original packages in Kansas a four-gallon keg of beer and a pint of whisky, part of a carload of liquor received by him from his principals earlier in 1890. He was arrested for violation of the Kansas general prohibition law passed before the act of Congress, and was discharged by the federal Circuit Court on writ of habeas corpus, from which decree this appeal was taken.]

Mr. Chief Justice FULLER. * * * The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694. And if a law passed by a state, in the exercise of its acknowledged powers, comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy, and that of the laws passed in pursuance thereof. * * *

The laws of Iowa under consideration in Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, and Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states; but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of com-

modities, is national in its character, and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled; and therefore that the laws of Iowa, referred to, were inoperative in so far as they amounted to regulations of foreign or interstate commerce in inhibiting the reception of such articles within the state, or their sale upon arrival, in the form in which they were imported there from a foreign country or another state. It followed as a corollary that, when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?

By the first clause of section 10 of article 1 of the Constitution, certain powers are enumerated which the states are forbidden to exercise in any event; and by clauses 2 and 3, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports by state enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the state to go in this direction. Nor can Congress transfer legislative powers to a state, nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. Cooley v. Board, 12 How. 299, 13 L. Ed. 996; Gunn v. Barry, 15 Wall. 610, 623, 21 L. Ed. 212; U. S. v. Dewitt, 9 Wall. 41, 19 L. Ed. 593.

It does not admit of argument that Congress can neither delegate its own powers, nor enlarge those of a state. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates ex proprio vigore as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the state. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result. Thus the grant to the general government of a power designed to prevent

embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution, the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any state of the right to demand, as between it and the others, what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course, and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.

The principle upon which local option laws, so called, have been sustained, is that, while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend. But we do not rest the validity of the act of Congress on this analogy. The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state. 12 Wheat. 448, 6 L. Ed. 678. No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so. The differences of opinion which have existed in this tribunal in many leading cases upon this subject have arisen, not from a denial of the power of Congress, when exercised but upon the question whether the inaction of Con-

gress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states. * * *

Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * * This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

Decree reversed.

[HARLAN, GRAY, and BREWER, JJ., did not concur in all of the reasoning of this opinion.]

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PLUMLEY v. MASSACHUSETTS (1894) 155 U. S. 461, 467, 468, 471–474, 478–481, 15 Sup. Ct. 154, 39 L. Ed. 223, Mr. Justice HARLAN (upholding as applied to interstate original packages a Massachusetts statute forbidding the sale of any oleomargarine which was in imitation of yellow butter):

[After holding that the federal internal revenue tax did not affect the question:] "It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that 'causes it to look like butter,' the right to sell it 'in a separate and distinct form, and in such manner as will advise the consumer of its real character,' is neither restricted nor prohibited. It appears in this case that oleomargarine, in its natural condition, is of 'a light yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from

unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artifically colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that state, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of olemargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? * *

[After discussing Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; and several cases similar to the latter:] "It is obvious that none of the above cases presented the question now before us. Each of them involved the question whether one state could burden interstate commerce by means of discriminations enforced for the benefit of its own products and industries at the expense of the products and industries of other states. It did not become material in any of them to inquire, nor did this court inquire, whether a state, in the exercise of its police powers, may protect the public against the deception and fraud that would be involved in the sale within its limits, for purposes of food, of a compound that had been so prepared as to make it appear to be what it was not. * * *

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. * * *

"But the case most relied on by the petitioner to support the

proposition that oleomargarine, being a recognized article of commerce may be introduced into a state, and there sold in original packages, without any restriction being imposed by the state upon such sale, is Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. * * * It is sufficient to say of Leisy v. Hardin that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that state to the contrary notwithstanding, was beer manufactured in Illinois, and shipped to the former state to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from Leisy v. Hardin must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import. * * *

[After referring to various state decisions upholding statutes like this one:] "It has been adjudged that the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people may be done by the states in the exercise of the right of self-defense. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use, and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the state, in which it is offered for sale, because of the circumstance that it is in an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the states are as competent to protect

their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. * * *

"In view of the complex system of government which exists in this country * * * the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

Mr. Chief Justice FULLER, dissenting [with whom concurred FIELD and BREWER, JJ.]:

"This [law] prohibits [the] sale [of oleomargarine] in its natural state of light yellow, or when colored a deeper yellow, because in either case it looks like butter. The statute is not limited to imitations made for a fraudulent purpose; that is, intentionally made to deceive. The act of Congress * * * and numerous acts of Massachusetts, minutely providing against deception in that respect, * * * amply protect the public from the danger of being induced to purchase oleomargarine for butter. The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see.

"I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities. In the language of Knowlton, J., in the dissenting opinion below, I am not 'prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations.'"

# INTERSTATE LAW OF THE CONSTITUTION [1]

## BLAKE v. McCLUNG.

(Supreme Court of United States, 1898. 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.)

[Error to the Supreme Court of Tennessee. The Embreeville Company, a British corporation, had complied with the provisions of the statute stated in the opinion below, and did business in Tennessee. The company became insolvent, and, upon a creditors' bill filed by McClung and others, a receiver was appointed who administered the assets. The chancery court entered a decree adjudicating that the creditors who were residents of Tennessee were, under the aforesaid statute, entitled to priority in the distribution of assets as against all creditors resident out of the state, whether citizens of other states or not. This was affirmed by the state Supreme Court, and a writ of error was taken by Blake and others, citizens of Ohio, and by the Hull Coal Company, a Virginia corporation, all of whom were creditors of the Embreeville Company.]

Mr. Justice HARLAN. * * * The plaintiffs in error contend that the judgment of the state court, based upon the statute, denies to them rights secured by the second section of the fourth article of the Constitution of the United States, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." * * *

We have seen that, by the third section of the Tennessee statute, corporations organized under the laws of other states or countries, and which complied with the provisions of the statute, were to be deemed and taken to be corporations of that state; and by the fifth section it is declared, in respect of the property of corporations doing business in Tennessee under the provisions of the statute, that creditors who are residents of that state shall have a priority in the distribution of assets, or the subjection of the same, or any part thereof, to the payment of debts, over all simple contract creditors, being residents of any other country or countries.

The suggestion is made that, as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the national Constitution relating to citizens. We cannot accede to this view. * * * Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this state" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there,

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 111–114.

without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto,—such residence as appertained to or inhered in citizenship. And the words, in the same statute, "residents of any other country or countries," refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted. * * *

Beyond question, a state may, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other states, and not citizens of the state in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities," in article 4 of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in Conner v. Elliot, 18 How. 591, 593 (15 L. Ed. 497), said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and

a failure to make it so would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.

One of the leading cases in which the general question has been examined is Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, decided by Mr. Justice Washington at the circuit. He said: "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety,—subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental, to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'"

These observations of Mr. Justice Washington were made in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds within that state, and which excluded inhabitants and residents of other states from the privilege of taking or gathering clams, oysters, or shells on any of the rivers, bays, or waters in New Jersey, not wholly owned by

some person residing in the state. The statute was sustained upon the ground that it only regulated the use of the common property of the citizens of New Jersey, which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The court said: "The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe."

In Paul v. Virginia, 8 Wall. 168, 180 (19 L. Ed. 357), the court observed that "it was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Lemmon v. People, 20 N. Y. 607. Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

Ward v. Maryland, 12 Wall. 418, 430 (20 L. Ed. 449), involved the validity of a statute of Maryland requiring all traders, not being permanent residents of the state, to take out licenses for the sale of goods, wares, or merchandise in Maryland, other than agricultural products and articles there manufactured. This court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the

state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell or offer or expose for sale within the district described in the indictment, any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the Slaughter-House Cases, 16 Wall. 36, 77 (21 L. Ed. 394), the court, referring to what was said in Paul v. Virginia, above cited, in reference to the scope and meaning of section 2 of article 4 of the Constitution, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In Cole v. Cunningham, 133 U. S. 107, 113, 114, 10 Sup. Ct. 271, 33 L. Ed. 538, this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states "a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions."

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot, however, stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did

not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state.

But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that, if the corporation became insolvent, its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution, upon the ground that it withheld from citizens of other states, as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business, and having the power to contract with citizens residing in states other than the one in which it is located? * * *

We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. * * *

We must not be understood as saying that a citizen of one state is entitled to enjoy in another state every privilege that may be given in the latter to its own citizens. There are privileges that

may be accorded by a state to its own people, in which citizens of other states may not participate, except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state, who becomes a resident thereof, shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established.

Nor must we be understood as saying that a state may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens, nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that state could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such order touching the assets of the company in Tennessee, as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that commonwealth.

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden

by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind, to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the state a fixed amount, to stand exclusively or primarily for the protection of its Tennessee creditors. * * *

We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that state; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee.

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation (Railroad Co. v. Letson, 2 How. 497, 11 L. Ed. 353; Drawbridge Co. v. Shepherd, 20 How. 227, 232, 15 L. Ed. 896; Railroad Co. v. Wheeler, 1 Black, 286, 296, 17 L. Ed. 130; Steamship Co. v. Tugman, 106 U. S. 118, 120, 1 Sup. Ct. 58, 27 L. Ed. 87; Steamship Co. v. Kane, 170 U. S. 100, 111, 18 Sup. Ct. 526, 42 L. Ed. 964); and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the state under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (Paul v. Virginia, 8 Wall. 168, 178, 179, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 415, 19 L. Ed. 972; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 573, 19 L. Ed. 1029). The Vir-

ginia corporation, therefore, cannot invoke that provision for protection against the decree of the state court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court. * * *

Judgment accordingly.

[BREWER, J., gave a dissenting opinion, in which FULLER, C. J., concurred, on the ground that the Tennessee statute discriminated, not against non-citizens, but against non-residents of the state.]

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## FAUNTLEROY v. LUM.

(Supreme Court of United States, 1908. 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039.)

[Error to the Supreme Court of Mississippi. The facts are stated in the opinion.]

Mr. Justice HOLMES. This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. * * * The plea was demurred to on constitutional grounds. * * * The Supreme Court of Mississippi held the plea good * * * and judgment was entered for the defendant. Thereupon the case was brought here. * * *

The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, "shall not be enforced by any court." Annotated Code of 1892, §§ 1120, 1121, 2117. * * *

[After deciding that the Mississippi courts had jurisdiction to consider the case:] We proceed at once to the further question, whether the illegality of the original cause of action in Mississippi can be relied upon there as a ground for denying a recovery upon a judgment of another state.

The doctrine laid down by Chief Justice Marshall was "that the judgment of a state court should have the same credit, validity, and

effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378. There is no doubt that this quotation was supposed to be an accurate statement of the law as late as Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475, where an attempt of Mississippi, by statute, to go behind judgments recovered in other states, was declared void, and it was held that such judgments could not be impeached even for fraud.

But the law is supposed to have been changed by the decision in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 L. Ed. 239, 8 Sup. Ct. 1370. That was a suit brought in this court by the state of Wisconsin upon a Wisconsin judgment against a foreign corporation. The judgment was for a fine or penalty imposed by the Wisconsin statutes upon such corporations doing business in the state and failing to make certain returns, and the ground of decision was that the jurisdiction given to this court by article 3, § 2, as rightly interpreted by the judiciary act, now Rev. Stat. § 687, U. S. Comp. Stat. 1901, p. 565, was confined to "controversies of a civil nature," which the judgment in suit was not. The case was not within the words of art. 1, § 1, and, if it had been, still it would not have, and could not have, decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court "cannot go behind the judgment for the purpose of examining into the validity of the claim." 127 U. S. 293. However, the whole passage was only a dictum and it is not worth while to spend much time upon it.

We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the act of May 26, 1790, chap. 11, 1 Stat. at L. 122 (Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677), providing that the said records and judicial proceedings "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." See further Tilt v. Kelsey, 207 U. S. 43, 57, 28 Sup. Ct. 1, 52 L. Ed. 95. Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. Pitts v. Fugate, 41 Mo. 405; State ex rel. Hudson v. Trammel, 106 Mo. 510, 17 S. W. 502; Re Copenhaver, 118 Mo. 377, 40 Am. St.

Rep. 382, 24 S. W. 161. A judgment is conclusive as to all the media concludendi (United States v. California & O Land Co., 192 U. S. 355, 48 L. Ed. 476, 24 Sup. Ct. 266); and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. Of course, a want of jurisdiction over either the person or the subject-matter might be shown. Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366, 23 Sup. Ct. 237; Clarke v. Clarke, 178 U. S. 186, 44 L. Ed. 1028, 20 Sup. Ct. 873. But, as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached in Mississippi even if it went upon a misapprehension of the Mississippi law. See Godard v. Gray, L. R. 6 Q. B. 139; MacDonald v. Grand Trunk R. Co., 71 N. H. 448, 59 L. R. A. 448, 93 Am. St. Rep. 550, 52 Atl. 982; Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711.

We feel no apprehensions that painful or humiliating consequences will follow upon our decision. No court would give judgment for a plaintiff unless it believed that the facts were a cause of action by the law determining their effect. Mistakes will be rare. In this case the Missouri court no doubt supposed that the award was binding by the law of Mississippi. If it was mistaken, it made a natural mistake. The validity of its judgment, even in Mississippi, is, as we believe, the result of the Constitution as it always has been understood, and is not a matter to arouse the susceptibilities of the states, all of which are equally concerned in the question and equally on both sides.

Judgment reversed.

[WHITE, J., gave a dissenting opinion, in which concurred HARLAN, MCKENNA, and DAY, JJ.]

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## HYATT v. NEW YORK ex rel. CORKRAN.

(Supreme Court of United States, 1903. 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657.)

[Error to the Court of Appeals of the state of New York to review a judgment discharging on habeas corpus a person held under a warrant issued in extradition proceedings by the governor of that state. The facts appear below.]

Mr. Justice PECKHAM. * * * In the case before us it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. * * *

It is, however, contended that a person may be guilty of a larceny or false pretense within a state without being personally

present in the state at the time. Therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the state.

The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition.

The language of § 5278, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3597), provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice, by the executive authority of a state *to which such person has fled,* and it provides that a copy of the indictment found, or affidavit made before a magistrate of any state, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the state or territory *from whence the person so charged has fled,* shall be produced, and it makes it the duty of the executive authority of the state *to which such person has fled* to cause him to be arrested and secured. Thus, the person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect, interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact, fled therefrom. * * *

The subsequent presence for one day (under the circumstances stated above) of the relator in the state of Tennessee, eight days

after the alleged commission of the act, did not, when he left the state, render him a fugitive from justice within the meaning of the statute. There is no evidence or claim that he then committed any act which brought him within the criminal law of the state of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it, and came away. The complaint was not made, nor the indictments found, until months after that time. His departure from the state after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight. * * *

Judgment affirmed.

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## ESTABLISHMENT OF REPUBLICAN GOVERNMENT [1]

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### LUTHER v. BORDEN.

**(Supreme Court of United States, 1849. 7 How. 1, 12 L. Ed. 581.)**

See ante, p. 38, for a report of this case.

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## STATE EXECUTIVE POWER [2]

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### MISSISSIPPI v. JOHNSON.

**(Supreme Court of United States, 1867. 4 Wall. 475, 18 L. Ed. 437.)**

See ante, p. 35, for a report of this case.

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### LUTHER v. BORDEN.

**(Supreme Court of United States, 1849. 7 How. 1, 12 L. Ed. 581.)**

See ante, p. 38, for a report of this case.

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## STATE JUDICIAL POWER [3]

See the cases ante, pp. 18–34, under The Three Departments of Government.

1 For discussion of principles, see Black, Const. Law (3d Ed.) §§ 117–119.
2 For discussion of principles, see Black, Const. Law (3d Ed.) §§ 125, 126.
3 For discussion of principles, see Black, Const. Law (3d Ed.) §§ 128, 134.

# STATE LEGISLATIVE POWER

## SHARPLESS v. MAYOR, ETC., OF CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania, 1853. 21 Pa. 147, 59 Am. Dec. 759.)

See ante, p. 12, for a report of this case.

## AUSTIN v. TENNESSEE.

(Supreme Court of United States, 1900. 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224.)

[Error to the Supreme Court of Tennessee. A state statute forbade the selling of cigarettes. Austin purchased from a factory in North Carolina a lot of cigarettes in pasteboard boxes containing 10 each, each box separately stamped and labeled as prescribed by the federal revenue laws. The vendor piled the boxes sold upon the floor of its warehouse, and an express company by its agent took them from the floor, put them in an open basket already in its possession, shipped them to Austin's town in Tennessee, and delivered from the basket, upon the counter in Austin's place of business, the whole lot of detached boxes. Austin sold one of these boxes, unbroken, and was convicted of violating the statute.]

Mr. Justice BROWN, * * * [After deciding that cigarettes were a legitimate article of commerce:] There is no reason to doubt the good faith of the legislature of Tennessee in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another state, we are remitted to the inquiry whether a paper package of 3 inches in length and 1½ inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the state while in the hands of the importer? This we regard as the vital question in the case.

The whole law upon the subject of original packages is based upon a decision of this court, in Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, in which a statute of Maryland, requiring all importers of foreign articles, "by bale or package," or of intoxicating liquors, and other persons selling the same, "by wholesale, bale or package, hogshead, barrel or tierce," to take out a license, was held to be repugnant to that provision of the Constitution for-

[4] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 137, 139.

bidding states from laying a duty upon imports, as well as to that declaring that Congress should have power to regulate commerce with foreign nations. There was thought to be no difference between a power to prohibit the sale of an article while it was an import and the power to prohibit its introduction into the country. The one would be the necessary consequence of the other. No goods would be imported if none could be sold. But, in delivering the opinion of the court, Mr. Chief Justice Marshall observed: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states. * * *

Most pertinent to this case, and, as we think, covering its principle completely, is the opinion of this court in May v. New Orleans, 178 U. S. 496, 44 L. Ed. 1165, 20 Sup. Ct. 976, decided at the last term. This involved the validity of certain tax assessments made by the city of New Orleans upon the merchandise and stock in trade of the plaintiff, which consisted of dry goods imported from foreign countries, upon which duties had been levied by and paid to the general government. The goods were put up and sold in packages, a large number of such packages being inclosed in wooden cases or boxes for the purposes of importation. Upon arrival at New Orleans the boxes were opened, the packages taken out and sold unbroken. The question was whether the box or case containing these packages, or the packages themselves were the original packages within the case of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. It was conceded that, so long as the packages remained in their original cases, they were not subject

to taxation, but the court held that this immunity ceased as soon as the boxes were opened. As stated by Mr. Justice Harlan in delivering the opinion of the court (p. 508, L. Ed. p. 1169):

"In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import, and became property subject to taxation by the state as other like property situated within its limits. The tax here in question was not in any sense a tax on imports nor a tax for the privilege of bringing the things imported into the state. It was not a tax on the plaintiff's goods because they were imported from another country, but because at the time of the assessment they were in the market for sale in separate parcels and therefore subject to be taxed as like property, in the same condition, that had its origin in this country. We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the state the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; the only difference being that the importers paid a duty to the United States for the privilege of importing their goods into this country, and of selling them in the original packages—a duty imposed for the purpose of raising money to carry on the operations of the government, and, in many instances, with the intent to protect the industries of this country against foreign competition."

The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the state cannot prohibit the sale in its original package of an article brought from another state, the size of the package is material, although some of the expressions in the License Cases seem to foreshadow the consequences likely to result from the argument of the defendant. * * * [Here follow quotations from the opinion of Catron, J., 5 How. at 608, 12 L. Ed. 303, and from Woodbury, J., Id. at 625, 12 L. Ed. 311, and also a discussion of various state cases dealing with the matter.]

The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in

the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words "original package" in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the state with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant's contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loosely; anything from a bale of merchandise to a single ribbon, provided only the dealer sees fit to purchase his stock outside the state and import it in minute quantities.

There could hardly be stronger evidence of fraud than is shown by the facts of this case. * * * And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discred-

itable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case we think it is the basket, and not the paper box. * * *

Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, § 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty, or one hundred cigarettes each. This, however, is solely for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with section 3243, which provides that "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state." * * *

Judgment affirmed.

[WHITE, J., gave a brief concurring opinion. BREWER, J., with whom concurred FULLER, C. J., and SHIRAS and PECKHAM, JJ., gave a dissenting opinion.]

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See, also, the cases ante, pp. 18–34, under The Three Departments of Government.

# THE POLICE POWER

## I. In General [1]

MUTUAL LOAN CO. v. MARTELL (1911) 222 U. S. 225, 232, 233, 32 Sup. Ct. 74, 56 L. Ed. 175, Mr. Justice McKenna (affirming a Massachusetts judgment which upheld a statute invalidating the assignment of future wages without the consent of the wage-earner's wife and employer):

"The contention of plaintiff is (1) that the provisions of sections 7 and 8 deprive it of due process of law. * * *

"(1) To sustain this contention it is urged that the statute being an exercise of the police power of the state, its purpose must have 'some clear, real, and substantial connection' with the preservation of the public health, safety, morals, or general welfare; and it is insisted that the statute of Massachusetts has not such connection and is therefore invalid.

"This court has had many occasions to define, in general terms, the police power, and to give particularity to the definitions by special applications. In Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596, 609, 4 Ann. Cas. 1175, it was said that 'the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety,' and that the validity of a police regulation 'must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose.'

"In Bacon v. Walker, 204 U. S. 311, 318, 27 Sup. Ct. 289, 51 L. Ed. 499, 502, it was decided that the police power is not confined 'to the suppression of what is offensive, disorderly, or unsanitary,' but 'extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.'

"In a sense, the police power is but another name for the power of government; [2] and a contention that a particular exercise of it

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 150–154.

[2] "In its broadest sense, as sometimes defined, it [the police power] includes all legislation and almost every function of government."—New Orleans Gas Light Co. v. Louisiana Light & Heat Producing Co., 115 U. S. 650, 661, 6 Sup. Ct. 252, 258, 29 L. Ed. 516 (1885), by Harlan, J.

"It may be said in a general way that the police power extends to all the

offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it; and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review."

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LICENSE CASES (1847) 5 How. 504, 582, 583, 12 L. Ed. 256, Mr. Chief Justice TANEY (affirming a New Hampshire judgment which upheld a state statute regulating the sale of liquor):

"It has been said, indeed, that quarantine and health laws are passed by the states, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

"Upon this question, the object and motive of the state are of no importance, and cannot influence the decision. It is a question

great public needs. Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."—Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487 (1911), by Holmes, J.

of power. Are the states absolutely prohibited by the Constitution from making any regulations of foreign commerce? If they are, then such regulations are null and void, whatever may have been the motive of the state, or whatever the real object of the law; and it requires no law of Congress to control or annul them."

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LAKE SHORE & M. S. RY. CO. v. OHIO ex rel. LAWRENCE (1899) 173 U. S. 285, 289, 290–292, 296–298, 19 Sup. Ct. 465, 43 L. Ed. 702, Mr. Justice HARLAN (upholding a state statute requiring railways to stop certain trains at places of 3,000 inhabitants):

"In the argument at the bar, as well as in the printed brief of counsel, reference was made to the numerous cases in this court adjudging that what are called the police powers of the states were not surrendered to the general government when the Constitution was ordained, but remained with the several states of the Union. And it was asserted with much confidence that, while regulations adopted by competent local authority in order to protect or promote the public health, the public morals, or the public safety have been sustained where such regulations only incidentally affected commerce among the states, the principles announced in former adjudications condemn, as repugnant to the Constitution of the United States, all local regulations that affect interstate commerce in any degree if established merely to subserve the public convenience.

"One of the cases cited in support of this position is Hennington v. Georgia, 163 U. S. 299, 303, 308, 317, 16 Sup. Ct. 1086, which involved the validity of a statute of Georgia [forbidding the running of freight trains on Sunday save in certain cases of necessity]. * * *

"After observing that the argument in behalf of the defendant rested upon the erroneous assumption that the statute of Georgia was such a regulation of interstate commerce as was forbidden by the Constitution without reference to affirmative action by Congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, did not go beyond the necessities of the case, and therefore was valid, at least until Congress intervened, this court, upon a review of the adjudged cases, said: 'These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional pro-

vision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved, and never surrendered to Congress, of providing for the public health, the public morals, and the public safety; and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce.' * * *

"It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the states, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the national Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the public convenience.

"This is an erroneous view of the adjudications of this court. While cases to which counsel refer involved the validity of state laws having reference directly to the public health, the public morals, or the public safety, in no one of them was there any occasion to determine whether the police powers of the states extended to regulations incidentally affecting interstate commerce, but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the states may legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the national Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class. [Here are discussed various cases upholding state laws regulating the use of bridges and rivers and the obligations of carriers.] * * *

"Now, it is evident that these cases had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced in the courts of the Union if they do not by their operation direct-

ly entrench upon the authority of the United States, or violate some right protected by the national Constitution. * * *

"It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, although inaccurately, used. But, in our opinion, the power, whether called 'police,' 'governmental,' or 'legislative,' exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government. Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243; Railway Co. v. Haber, 169 U. S. 613, 626, 18 Sup. Ct. 488, 42 L. Ed. 878. * * *"

[SHIRAS, J., gave a dissenting opinion, in which BREWER, WHITE, and PECKHAM, JJ., concurred, on the ground that the Ohio statute improperly burdened interstate commerce. WHITE, J., also gave a dissenting opinion.]

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In re RAPIER (1892) 143 U. S. 110, 134, 12 Sup. Ct. 374, 36 L. Ed. 93, Mr. Chief Justice FULLER (upholding the power of the United States to exclude lottery matter from the mails):

"The states, before the Union was formed, could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."

SECOND EMPLOYERS' LIABILITY CASES (1912) 223 U. S. 1, 54, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, Mr. Justice VAN DEVANTER (upholding the federal act regulating the liability of interstate railway carriers to their employés):

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employés while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. * * * The inaction of Congress, however, in no wise affected its power over the subject. * * * And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." [3]

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## II. Scope and Limits of Power [4]

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L'HOTE v. NEW ORLEANS (1900) 177 U. S. 587, 596–598, 600, 20 Sup. Ct. 788, 44 L. Ed. 899, Mr. Justice BREWER (sustaining an ordinance prescribing limits in that city outside of which no woman of lewd character should dwell, as against objections of property owners within those limits):

"The question * * * is simply whether one who may own or occupy property in or adjacent to the prescribed limits, whether

[3] Regarding the subjects over which Congress has exercised a "police power" incidental to the powers specifically conferred upon the United States by the Constitution, it has been said (upholding the federal pure food and drugs act): "Congress has enacted a safety appliance law for the preservation of life and limb. Congress has enacted the anti-trust statute to prevent immorality in contracts and business affairs. Congress has enacted the live stock sanitation act to prevent cruelty to animals. Congress has enacted the cattle contagious disease act to more effectively suppress and prevent the spread of contagious and infectious diseases of live stock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the meat inspection act. Congress has enacted a second employer's liability act. Congress has enacted the obscene literature act. Congress has enacted the lottery statute above referred to. Congress has enacted (but a year ago) statutes prohibiting the sending of liquors by interstate shipment with the privilege of the vendor to have the liquors delivered c. o. d., and to prohibit shipments of liquors except when the name and address of the consignee and the quantity and kind of liquor is plainly labeled on the package. These statutes, police regulations in many respects, are alike in principle to the act of June 30, 1906, under consideration. Can it be possible they are all void?"—Shawnee Milling Co. v. Temple (C. C.) 179 Fed. 517, 524 (1910), by McPherson, J.

[4] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 155, 156.

occupied as a residence or for other purposes, can prevent the enforcement of such an ordinance on the ground that by it his rights under the federal Constitution are invaded.

"In this respect we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of population the things which minister to vice tend to increase and multiply. * * *

"Obviously, the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state and Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.

"Now, this ordinance neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicil, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the vocation of these persons to certain localities, and no one can question the legality of the location. The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries.

"We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and cannot become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?

"It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, and therefore the power to prescribe limits could never be exercised, because, whatever the limits, it might operate to the pecuniary disadvantage of some property holders.

"The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character. * * * Here the ordinance in no manner touched the property of the plaintiffs. It subjected that property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by this ordinance. Who can say in advance that in proximity to their property any houses of the character indicated will be established, or that any persons of loose character will find near by a home? They may go to the other end of the named district. All that can be said is that by narrowing the limits within which such houses and people must be, the greater the probability of their near location. Even if any such establishment should be located in proximity, there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance."

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## OTIS AND GASSMAN v. PARKER.

**(Supreme Court of United States, 1903. 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323.)**

[Error to the Supreme Court of California. The state Constitution made void all contracts for the sale of corporate stock on margin or for future delivery, and authorized a recovery of any money paid on such contracts. Parker sued defendants, stockbrokers, for margins paid them on contracts to buy and sell mining stocks. It was assumed that the prohibition included all contracts contemplating a bona fide acquisition of stock, as well as gambling contracts. A judgment in his favor in the superior court was affirmed by the state Supreme Court, and this writ of error was brought.]

Mr. Justice HOLMES. * * * The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the fourteenth amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due

process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.

It is true, no doubt, that neither a state legislature nor a state Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205, 210; Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385, 388. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.

Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." Booth v. Illinois, 184 U. S. 425, 429, 22 Sup. Ct. 425, 427, 46 L. Ed. 623, 626. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the fourteenth amendment became law, as indeed they were in some civilized states. See Ballock v. State, 73 Md. 1, 20 Atl. 184, 8 L. R. A. 671, 25 Am. St. Rep. 559.

We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. Cashman v. Root, 89 Cal. 373, 382, 383, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482. If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in Booth v. Illinois, 184 U. S. 425, 431, 22 Sup. Ct. 425, 46 L. Ed. 623, 627, we are unwilling to declare the judgment to have been wholly without foundation. * * *

Judgment affirmed.

[BREWER and PECKHAM, JJ., dissented.]

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## JACOBSON v. MASSACHUSETTS.

(Supreme Court of United States, 1905. 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.)

[Error to the Superior Court of Middlesex county, Massachusetts. A statute gave local boards of health authority, whenever in their opinion necessary for the public health, to require the vaccination of all inhabitants of their city or town, except children who presented medical certificates that they were unfit subjects for vaccination. Jacobson was convicted in said court of refusing to comply with such an order of the Cambridge board of health. His offer to prove that vaccination was useless to prevent smallpox, and that it was often dangerous was denied by the trial court. The state Supreme Court affirmed the conviction.]

Mr. Justice HARLAN. * * * We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471, 24 L. Ed. 527, 530; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 628, 629, 18 Sup. Ct. 488, 42 L. Ed. 878–883; Thorpe v. Rutland & B. R. Co., 27 Vt. 148, 62 Am. Dec. 625. * * *

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that

when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety.

Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 301, 21 Sup. Ct. 115, 45 L. Ed. 194, 201; 1 Dill. Mun. Corp. (4th Ed.) §§ 319–325, and authorities in notes; Freund, Police Power, § 63 et seq. * * * If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,—if nothing more could be reasonably affirmed of the statute in question,—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written Constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances,

be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the fourteenth amendment, this court has said, consists, in part, in the right of a person "to live and work where he will" (Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public collectively against such danger. * * *

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population.

Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has

done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205, 210; Minnesota v. Barber, 136 U. S. 313, 320, 10 Sup. Ct. 862, 34 L. Ed. 455, 458, 3 Interst. Com. R. 185; Atkin v. Kansas, 191 U. S. 207, 223, 24 Sup. Ct. 124, 48 L. Ed. 148, 158.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. * * * [Quotations are here given from various sources showing the practice of other countries, and a number of American state cases are cited upholding vaccination as a condition of attending the public schools.]

The latest case upon the subject of which we are aware is Viemeister v. White, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. * * * [The statute was upheld] the court saying among other things: * * * "A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. * * * The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by every one. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a

reasonable and proper exercise of the police power." 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334. * * *

The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject of vaccination at the time he was informed of the requirement of the regulation adopted by the board of health. * * * Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety confessedly endangered by the presence of a dangerous disease. * * *

Judgment affirmed.

[BREWER and PECKHAM, JJ., dissent.]

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## MUGLER v. KANSAS.

**(Supreme Court of United States, 1887. 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.)**

[Writs of error from Supreme Court of Kansas and an appeal from the United States Circuit Court for Kansas. Mugler was convicted of violating a Kansas statute enacted to carry into effect an amendment of the state Constitution forbidding the manufacture or sale of intoxicating liquor except for medical, mechanical, and scientific purposes. His offences consisted of selling beer manufactured before the statute went into effect, and of manufacturing beer in a brewery built several years before the adoption of the amendment. Both convictions were upheld by the state Supreme Court. The third case was a proceeding against one Ziebold and his partner to have their brewery closed as a common nuisance under the statute, and to have them enjoined from using the premises for the disposal of liquor. The case was removed to the federal Circuit Court, where the state's suit was dismissed. All cases were then brought here.]

Mr. Justice HARLAN. * * * That legislation by a state pro-

hibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the fourteenth amendment; to some of which, in view of questions to be presently considered, it will be well to refer. * * * [Here follow quotations from the License Cases, 5 How. 504, 12 L. Ed. 256, Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929, Boston Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. Ed. 989, and Foster v. Kansas ex rel. Johnston, 112 U. S. 206, 5 Sup. Ct. 8, 97, 28 L. Ed. 696.]

It is, however, contended, that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the state and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in Munn v. Illinois, 94 U. S. 113, 124, 24 L. Ed. 77, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, it is to be determined whether the manufacture of particular articles of drink, either for

general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation.

Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by

the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare. * * *

It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. * * * [Here follow statements of or quotations from Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct 652, 28 L. Ed. 585; Stone v. Mississippi, post, p. 461, and New Or-

leans Gas Co. v. Louisiana Light Co., post, p. 464,—all to the effect that the state cannot, even by contract, restrict its power to protect the public health, morals, or safety.]

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. Beer Co. v. Massachusetts, 97 U. S. 25, 32, 24 L. Ed. 989; Commonwealth v. Alger, 7 Cush. (Mass.) 53. * * *

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not there-

by give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in Stone v. Mississippi, above cited, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in Beer Co. v. Massachusetts, 97 U. S. 32, 24 L. Ed. 989: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer." * * *

Judgments of Kansas Supreme Court affirmed.

Decree of Circuit Court reversed.

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## POWELL v. PENNSYLVANIA.

**(Supreme Court of United States, 1887. 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.)**

[Error to the Supreme Court of Pennsylvania. A Pennsylvania statute forbade the manufacture, sale, or the keeping with intent to sell, of any oleaginous article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream. Powell was convicted in a county quarter sessions court of violating this statute by selling and keeping for sale packages of oleomargarine plainly labeled and sold as such, which had been lawfully made in the state prior to the passage of the statute. The trial court refused to allow Powell to prove that the articles sold by him were wholesome articles of food, cleanly manufactured, and only differed from dairy butter in composition, in that they contained a slightly smaller percentage of butterine, a substance giving flavor to butter, but adding nothing to its wholesomeness. The conviction was affirmed by the state Supreme Court.]

Mr. Justice HARLAN. * * * This case in its important aspects is governed by the principles announced in Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. * * * The question, therefore, is whether the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell,

the same, as an article of food, is a lawful exercise by the state of the power to protect, by police regulations, the public health.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 700, 718, 25 L. Ed. 496, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, Fletcher v. Peck, 6 Cranch, 87, 128, 3 L. Ed. 162; Dartmouth College v. Woodward, 4 Wheat. 518, 625, 4 L. Ed. 629; Livingston v. Darlington, 101 U. S. 407, 25 L. Ed. 1015.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to deter-

mine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself;" yet, "in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." Yick Wo v. Hopkins, 118 U. S. 370, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The case before us belongs to the latter class. The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary de-

partment is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land. * * *

Judgment affirmed.

[Mr. Justice FIELD gave a dissenting opinion.]

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## DENT v. WEST VIRGINIA.

(Supreme Court of United States, 1889. 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623.)

[Error to the Supreme Court of West Virginia. A statute of 1882 made it a misdemeanor to practice medicine in the state unless the practitioner obtained a certificate from the state board of health that he was a graduate of a reputable medical college, or upon examination by this board was found qualified to practice medicine, or had practiced medicine continuously in the state for ten years prior to March 8, 1881. Dent had practiced in the state continuously from 1876, and did not comply with any of the above alternative qualifications. His conviction in the circuit court for a violation of the statute in 1882 was affirmed by the state Supreme Court. He alleged that the statute violated the fourteenth amendment, in depriving him without due process of law of a vested right to practice his profession.]

Mr. Justice FIELD. * * * It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate," acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus

taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a

knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications. * * *

There is nothing of an arbitrary character in the provisions of the statute in question. It applies to all physicians, except those who may be called for a special case from another state. It imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters,—that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the state a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient. * * *

Judgment affirmed.[5]

[5] "We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our Legislature, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of legislation and control. Our health, our comfort, and our well-being are materially affected by all of our surroundings—by the houses we live in, the clothes we wear, and the food we eat. The safety of the traveling public depends in no small degree on the skill and capacity of the section crews that build and repair our railroads, yet are we on this account to add the architect, the carpenter, the tailor, the shoemaker, those who produce and prepare our food, and all the rest to the ever-growing list? If so, it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission. The public health is entitled to

## CITY OF CHICAGO v. NETCHER.

(Supreme Court of Illinois, 1899. 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, 75 Am. St. Rep. 93.)

[Appeal from a judgment of the Cook county criminal court holding invalid certain city regulations of department stores. Chicago ordinances forbade provisions to be exposed for sale where dry goods, clothing, jewelry, and drugs were sold; or for liquor to be sold where dry goods, clothing, jewelry, or hardware were kept for sale. Defendant sold all of these articles at his department store in Chicago (the liquor being sold only in sealed packages and not to be drunk on the premises) and was prosecuted therefor.]

Mr. Chief Justice CARTWRIGHT. * * * The incorporation act relied upon confers upon cities organized under the act the right to regulate the sale of provisions, with the object of promoting or preserving the public health, where the regulation tends to serve that purpose. But this ordinance does not regulate the business of selling provisions, nor prescribe the manner in which the business shall be carried on. It merely prohibits persons engaged in the business of selling dry goods, clothing, jewelry, and drugs from selling in their stores the provisions enumerated in the ordinance. It permits a person to sell in any place or manner, provided, only, that he does not at the same time sell certain other things. A dealer may sell provisions at the same place with hardware, furniture, boots and shoes, hats and caps, millinery, books and stationery, crockery and glassware, carpets, confectionery, wooden ware, wall paper, or any other sort of merchandise except dry goods, clothing, jewelry, and drugs. This is not a regulation, but a prohibition, and a purely arbitrary one, which attempts to deprive certain persons of exercising a right which has always been lawful, and has been heretofore exercised throughout the state and country without question.

The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the Constitutions of the

consideration at the hands of the legislative department of the government, but it must be remembered that liberty does not occupy a secondary place in our fundamental law. Under some of the acts to which we have referred members of the board of health form part of the examining board, but our act has not even this saving grace. By its terms two master plumbers and one journeyman plumber are constituted the guardians of the public health and welfare. We are not permitted to inquire into the motive of the Legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view. We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the Constitution of the United States."—Rudkin, J., in State ex rel. Richey v. Smith, 42 Wash. 237, 248, 249, 84 Pac. 851, 854 (5 L. R. A. [N. S.] 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577) (1906) (collecting cases), holding invalid an act requiring journeyman plumbers to be examined and licensed by a state board.

United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined, and uniformly upheld. These Constitutions insure to every person liberty, and the protection of his property rights, and provide that he shall not be deprived of life, liberty, or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. * * *

It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them; nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In Meyers v. Baker, 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580, the act prohibiting the establishment of any tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all

other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case. * * *

[After referring to the power of the state to regulate liquor-selling:] This ordinance, however, is not an exercise of the police power for the protection of the public from the injurious effects of the liquor business. It is not aimed at the suppression of the business, either in certain localities or upon any ground of police regulation, but is directed solely against the sale by certain persons in their places of business; that is, by those who also sell dry goods, clothing, jewelry, or hardware. The city of Chicago has not seen fit to prohibit the sale of liquor, either generally or in the district of the city where defendant's store is kept. It has established its policy with reference to that business, and defendant has complied with its ordinances, so as to be entitled to sell liquor in his store, unless this ordinance constitutes a valid prohibition against his doing so. It is apparent that, if there is any evil in permitting a sealed bottle of liquor to be sold from a store where dry goods, clothing, jewelry, or hardware are sold the same evils would result from the sale from any other kind of a store. The ordinance permits the dealer in all kinds of merchandise, except dry goods, clothing, jewelry, and hardware, to sell liquor from his store, and the city cannot arbitrarily discriminate against the defendant without any basis or ground for the discrimination. Special privileges are not to be granted to favored persons in the liquor business any more than in any other business. Zanone v. Mound City, 103 Ill. 552. * * *

Judgment affirmed.

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## MUNN v. ILLINOIS.

(Supreme Court of United States, 1876. 94 U. S. 113, 24 L. Ed. 77.)

[Error to the Supreme Court of Illinois, which had upheld a conviction of Munn and Scott for violating a state statute fixing maximum rates for grain elevator charges. Other facts appear in the opinion.]

Mr. Chief Justice WAITE. The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." * * *

The Constitution contains no definition of the word "deprive," as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the fifth amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth, as a guarantee against any encroachment upon an acknowledged right of citizenship by the legislatures of the states. * * *

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe v. R. & V. Railroad Co., 27 Vt. 143, 62 Am. Dec. 625); but it does not authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim "Sic utere tuo ut alienum non lædas." From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 12 L. Ed. 256, "are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the fifth amendment in force Con-

gress, in 1820, conferred power upon the city of Washington "to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor, * * * and the weight and quality of bread," 3 Stat. 587, § 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 Id. 224, § 2.

From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be juris privati only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * * [Here follow quotations from Lord Hale, regarding ferries and wharves, and from Aldnutt v. Inglis, 12 East, 527, regarding warehouses.]

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate"; but the court said, "there is no motive * * * for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which direct-

ly affects the body of the people. Upon this principle, in this state, tavernkeepers are licensed; * * * and the county court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." Mobile v. Yuille, 3 Ala. 140, 36 Am. Dec. 441.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: "And whereas divers wagoners and other carriers by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," etc. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain) 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382, 12 L. Ed. 465. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and Northwest sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. * * * Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. * * * The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. * * * In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying

on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West with four or five of the states lying on the sea-shore, and forms the largest part of interstate commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. * * * They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz,

that he * * * take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be juris privati only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. * * *

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which

legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. * * *

Judgment affirmed.

[FIELD, J., gave a dissenting opinion, in which STRONG, J., concurred.]

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SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY (1899) 174 U. S. 739, 754–758, 19 Sup. Ct. 804, 43 L. Ed. 1154, Mr. Justice HARLAN (upholding a municipal schedule of water rates):

"What elements are involved in the general inquiry as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in Smyth v. Ames [169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819]. That case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in that state. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations, and justify

a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws. After observing that this broad proposition involved a misconception of the relations between the public and a railroad corporation, that such a corporation was created for public purposes, and performed a function of the state, and that its right to exercise the power of eminent domain, and to charge tolls, was given primarily for the benefit of the public, this court said: 'It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged.' 169 U. S. 544, 18 Sup. Ct. 433, 42 L. Ed. 819. In the same case it was also said that 'the basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.' 169 U. S. 546, 18 Sup. Ct. 434, 42 L. Ed. 819.

"This court had previously held in Road Co. v. Sandford, 164 U. S. 578, 596, 598, 17 Sup. Ct. 198, 41 L. Ed. 560, which case involved the reasonableness of rates established by legislative enactment for a turnpike company, that a corporation performing public services was not entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered; and that the rights of the public were not to be ignored. The court in that case further said: 'Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what, under all the circumstances, is such compensation for the use of its property as will be just, both to it and to the public.'

"These principles are recognized in recent decisions of the supreme court of California. San Diego Water Co. v. City of San Diego (1897) 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261; Redlands L. & C. Domestic Water Co. v. City of Redlands (1898) 121 Cal. 365, 53 Pac. 843, 844.

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as, under all the circumstances, will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have

just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just, both to the company and to the public."

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## LOCHNER v. NEW YORK.

(Supreme Court of United States, 1905. 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133.)

[Error to the county court of Oneida county, New York. A New York statute forbade any employé in a bakery or confectionery establishment to be permitted to work over 60 hours in any one week, or an average of over 10 hours a day for the number of days such employés should work. Lochner was convicted in said county court of violating this statute in the city of Utica, and the conviction was affirmed on appeal by the Appellate Division and by the Court of Appeals of the state, which remanded the case to the original court for further proceedings.]

Mr. Justice PECKHAM. * * * The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the fourteenth amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Crowley v. Christen-

sen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; Re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the fourteenth amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employé), it becomes of great importance to determine which shall prevail,—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. 383. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employés in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employés from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the supreme court of Utah in that case was made by the judge writing

the opinion of this court, and approved: "The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in Holden v. Hardy which covers the case now before us. Nor does Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, touch the case at bar. The Atkin Case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, is equally far from an authority for this legislation. The employés in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer. * * * [Jacobson v. Massachusetts, ante, p. 218, and Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716, are here stated.]

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the fourteenth amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to

labor which may seem to him appropriate or necesary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. * * *

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the

right of an individual, sui juris, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, and Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employés. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others,

from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real-estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employés condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme.

We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in

and of itself, to say that there is material danger to the public health, or to the health of the employés, if the hours of labor are not curtailed. * * *

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. * * * The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. * * * It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution. * * *

Judgment reversed.

Mr. Justice HARLAN [with whom concurred WHITE and DAY, JJ.] dissenting: * * * I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. * * *

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. * * *

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the

question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. * * *

Mr. Justice HOLMES dissenting: I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state Constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323. The decision sustaining an eight-hour law for miners is still recent. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. Some of these

laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty," in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

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## McLEAN v. ARKANSAS.

**(Supreme Court of United States, 1909. 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315.)**

[Error to the Supreme Court of Arkansas. A statute criminally forbade the operator of any coal mine employing at least ten men underground, whose miners were paid at quantity rates, from using screens or other devices to reduce the amount of wages that would be due on the basis of the weight of coal actually mined and accepted by the operator. A state Circuit Court convicted McLean, an agent of such a coal company, for violating this statute, and the state Supreme Court affirmed this.]

Mr. Justice DAY. * * * That the Constitution of the United States, in the fourteenth amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business, against hostile state legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. Allgeyer v. Louisiana, 165 U. S. 578, 17

Sup. Ct. 427, 41 L. Ed. 832; Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. But, in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. * * *

In Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés, did not conflict with any provisions of the Constitution of the United States, protecting the right of contract. In Frisbie v. United States, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657, the act of Congress prohibiting attorneys from contracting for a larger fee than $10 for prosecuting pension claims was held to be a valid exercise of police power. * * * In Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, this court held that an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance was valid. * * *

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * * This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week, or month; it does not prevent the operator from rejecting coal improperly or negligently mined, and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. * * * [Here are mentioned Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853, and In re House Bill No. 203, 21 Colo. 27, 39 Pac. 431, holding such legislation invalid, and State v. Peel Splint Coal Co., 36

W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385, maintaining it by a divided court.]

Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 18, 1898. * * * A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners. This condition was testified to have been the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it, or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as the basis of paying the miner's wages.

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state.

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although, in compelling certain modes of dealing, they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on "Police Power" (section 274), wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of 500 pounds or more, by weight; that milk shall be sold in wine measure, and kindred enactments.

Upon this branch of the case it is argued for the validity of this law that its tendency is to require the miner to be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because, while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually mined. It is not denied that the coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled

to judge and act for itself in the exercise of its lawful power to pass remedial legislation. * * *

Judgment affirmed.

[BREWER and PECKHAM, JJ., dissented.]

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## ADAIR v. UNITED STATES.

(Supreme Court of United States, 1908. 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.)

[Error to the federal District Court for the Eastern District of Kentucky. An act of Congress (Act June 1, 1898, c. 370) provided for the arbitration of disputes between interstate railroad carriers and their employés, and by section 10 made it a misdemeanor for such carriers or their agents to "threaten any employé with loss of employment," or "unjustly [to] discriminate against any employé because of his membership in [any] labor corporation, association, or organization." Adair was indicted for violating this section, in that, as agent for an interstate railroad, he discharged one Coppage because of his membership in a labor union. The trial court overruled a demurrer to the indictment, and this writ of error was taken.]

Mr. Justice HARLAN. * * * The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the fifth amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment. Such liberty and right embrace the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. * * *

It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employé of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any

legal concern. It is also his right to have business relations with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress." * * * [Lochner v. New York, ante, p. 245, is here discussed.]

While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

These views find support in adjudged cases, some of which are cited in the margin. [Citations omitted.] Of course, if the parties by contract fixed the period of service, and prescribed the conditions upon which the contract may be terminated, such contract would control the rights of the parties as between themselves, and for any violation of those provisions the party wronged would have his appropriate civil action. And it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employé, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it. In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than

an employé can be compelled, against his will, to remain in the personal service of another. * * *

Judgment reversed.

Mr. Justice McKenna, dissenting. * * * The provisions of the act are explicit and present a well co-ordinated plan for the settlement of disputes between carriers and their employés, by bringing the disputes to arbitration and accommodation, and thereby prevent strikes and the public disorder and derangement of business that may be consequent upon them. * * *

We are told that labor associations are to be commended. May not, then, Congress recognize their existence? Yes, and recognize their power as conditions to be counted with in framing its legislation. Of what use would it be to attempt to bring bodies of men to agreement and compromise of controversies if you put out of view the influences which move them or the fellowship which binds them,—maybe controls and impels them, whether rightfully or wrongfully, to make the cause of one the cause of all? And this practical wisdom Congress observed,—observed, I may say, not in speculation or uncertain prevision of evils, but in experience of evils,—an experience which approached to the dimensions of a national calamity. The facts of history should not be overlooked nor the course of legislation. The act involved in the present case was preceded by one enacted in 1888 of similar purport. 25 Stat. at Large, 501, c. 1063. That act did not recognize labor associations, or distinguish between the members of such associations and the other employés of carriers. It failed in its purpose, whether from defect in its provisions or other cause we may only conjecture. At any rate, it did not avert the strike at Chicago in 1894. Investigation followed, and, as a result of it, the act of 1898 was finally passed. Presumably its provisions and remedy were addressed to the mischief which the act of 1888 failed to reach or avert.

It was the judgment of Congress that the scheme of arbitration might be helped by engaging in it the labor associations. Those associations unified bodies of employés in every department of the carriers, and this unity could be an obstacle or an aid to arbitration. It was attempted to be made an aid; but how could it be made an aid if, pending the efforts of "mediation and conciliation" of the dispute, as provided in section 2 of the act, other provisions of the act may be arbitrarily disregarded, which are of concern to the members in the dispute? How can it be an aid, how can controversies which may seriously interrupt or threaten to interrupt the business of carriers (I paraphrase the words of the statute) be averted or composed if the carrier can bring on the conflict or prevent its amicable settlement by the exercise of mere whim and caprice? I say mere whim or caprice, for this is the liberty which

is attempted to be vindicated as the constitutional right of the carriers. And it may be exercised in mere whim and caprice. If ability, the qualities of efficient and faithful workmanship, can be found outside of labor associations, surely they may be found inside of them. Liberty is an attractive theme, but the liberty which is exercised in sheer antipathy does not plead strongly for recognition. * * *

It also seems to me to be an oversight of the proportions of things to contend that, in order to encourage a policy of arbitration between carriers and their employés which may prevent a disastrous interruption of commerce, the derangement of business, and even greater evils to the public welfare, Congress cannot restrain the discharge of an employé, and yet can, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise shall be carried. And mark the contrast of what is prohibited. In the one case the restraint, it may be, of a whim,—certainly of nothing that affects the ability of an employé to perform his duties; nothing, therefore, which is of any material interest to the carrier,—in the other case, a restraint of a carefully-considered policy which had as its motive great material interests and benefits to the railroads, and, in the opinion of many, to the public. May such action be restricted, must it give way to the public welfare, while the other, moved, it may be, by prejudice and antagonism, is intrenched impregnably in the fifth amendment of the Constitution against regulation in the public interest?

I would not be misunderstood. I grant that there are rights which can have no material measure. There are rights which, when exercised in a private business, may not be disturbed or limited. With them we are not concerned. We are dealing with rights exercised in a quasi public business, and therefore subject to control in the interest of the public.

Mr. Justice HOLMES, dissenting. * * * The ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the states, as that it interferes with the paramount individual rights secured by the fifth amendment. The section is, in substance, a very limited interference with freedom of contract, no more. It does not require the carriers to employ anyone. It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract law-

fully may be made to end are less open to regulation than other terms. So I turn to the general question whether the employment can be regulated at all.

I confess that I think that the right to make contracts at will that has been derived from the word "liberty" in the amendments has been stretched to its extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as Congress can deal with, I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ; I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind; but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

[MOODY, J., did not sit.]

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## NOBLE STATE BANK v. HASKELL.

(Supreme Court of United States, 1911. 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. [N. S.] 1062, Ann. Cas. 1912A, 487.)

[Error to the Supreme Court of Oklahoma. A state statute created a banking board directed to levy an assessment upon every state bank's average daily deposits in order to create a depositors' guaranty fund. When the cash of any insolvent bank in liquidation should be insufficient to pay all depositors, the deficit was to be made up from this guaranty fund and from further assessments, if necessary, reserving a lien upon the assets of the failing bank to secure money thus taken from the fund. Plaintiff bank sought to enjoin the banking board from collecting such assessments from it, and its petition was dismissed in the state courts.]

Mr. Justice HOLMES. * * * We must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress

a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus mutare as against the lawmaking power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see Danby Bank v. State Treasurer, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignficant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 531, 26 Sup. Ct. 301, 50 L. Ed. 581, 583, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231; Bacon v. Walker, 204 U. S. 311, 315, 27 Sup. Ct. 289, 51 L Ed. 499, 501. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; Deserant v. Cerillos Coal R. Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare re-

quires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling v. Chicago, 177 U. S. 183, 188, 20 Sup. Ct. 633, 44 L. Ed. 725. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Danby Bank v. State Treasurer, 39 Vt. 92; People v. Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux v. Young, 211 U. S. 489, 496, 29 Sup. Ct. 174, 53 L. Ed. 295, 300; Kidd, D. & P. Co. v. Musselman Grocer Co., 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839.

It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 828, 831, 14 Ann. Cas. 560. It will serve as a datum on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. Citizens' L. Asso. v. Topeka, 20 Wall. 655, 22 L. Ed. 455; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not

answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong [citing cases].

Decree affirmed.

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## HEAD v. AMOSKEAG MFG. CO.

**(Supreme Court of United States, 1885. 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889.)**

[Error to the Supreme Court of New Hampshire. A general statute authorized the erection of mills and dams upon nonnavigable streams upon payment of damages to the owners of lands flowed by the dams. The Amoskeag Company filed a petition for the ascertainment of the damages suffered by Head from flowage from their dam, and Head alleged the invalidity of the statute under the fourteenth amendment. His objections were overruled and judgment was entered entitling the company to flow his land on payment of the amount of damage found.]

Mr. Justice GRAY. * * * [After referring to numerous mill acts in 29 states:] In most of those states, their validity has been assumed, without dispute; and they were never adjudged to be invalid anywhere until since 1870, and then in 3 states only, and for incompatibility with their respective Constitutions. Loughbridge v. Harris (1871) 42 Ga. 500; Tyler v. Beacher (1871) 44 Vt. 648, 8 Am. Rep. 398; Ryerson v. Brown (1877) 35 Mich. 333, 24 Am. Rep. 564. The earlier cases in Tennessee, Alabama and New York, containing dicta to the same effect, were decided upon other grounds. Harding v. Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546; Memphis Railroad v. Memphis, 4 Cold. (Tenn.) 406; Moore v. Wright, 34 Ala. 311, 333; Bottoms v. Brewer, 54 Ala. 288; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42, 47, and 2 N. Y. 159, 51 Am. Dec. 279. * * *

The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of emi-

nent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or in many states, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold. King v. Reed, 11 Gray (Mass.) 490; Bentley v. Long Dock Co., 14 N. J. Eq. 480; s. c. on appeal, nom. Manners v. Bentley, 15 N. J. Eq. 501; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Richardson v. Monson, 23 Conn. 94. Water rights held in common, incapable of partition at law, may be the subject of partition in equity, either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds. Smith v. Smith, 10 Paige (N. Y.) 470; De Witt v. Harvey, 4 Gray (Mass.) 486; McGillivray v. Evans, 27 Cal. 92.

At the common law, as Lord Coke tells us: "If two tenants in common, or joint tenants, be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ de reparatione facienda; and the writ saith, ad reparationem et sustentationem ejusdem domus teneantur; whereby it appeareth that owners are in that case bound pro bono publico to maintain houses and mills which are for habitation and use of men." Co. Lit. 200b; 4 Kent Com. 370. In the same spirit, the statutes of Massachusetts, for a hundred and seventy-five years, have provided that any tenant in common of a mill in need of repair may notify a general meeting of all the owners for consultation, and that, if any one refuses to attend, or to agree with the majority, or to pay his share, the majority may cause the repairs to be made, and recover his share of the expenses out of the mill or its profits or earnings. Mass. Prov. Stat. 1709,

ch. 3, 1 Prov. Laws (State ed.) 641, and Anc. Chart. 388; Stat. 1795, ch. 74, §§ 5–7; Rev. Stat. 1836, ch. 116, §§ 44–58; Gen. Stat. 1860, ch. 149, §§ 53–64; Pub. Stat. 1882, ch. 190, §§ 59–70. And the statutes of New Hampshire, for more than eighty years, have made provision for compelling the repair of mills in such cases. Roberts v. Peavey, 7 Foster (27 N. H.) 477, 493.

The statutes which have long existed in many states authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Coomes v. Burt, 22 Pick. (Mass.) 422; Wright v. Boston, 9 Cush. (Mass.) 233, 241; Sherman v. Tobey, 3 Allen (Mass.) 7; Lowell v. Boston, 111 Mass. 454, 469, 15 Am. Rep. 39; French v. Kirkland, 1 Paige (N. Y.) 117; People v. Brooklyn, 4 N. Y. 419, 438, 55 Am. Dec. 266; Coster v. Tide Water Co., 18 N. J. Eq. 54, 68, 518, 531; O'Reiley v. Kankakee Valley Drainage Co., 32 Ind. 169.

By the maritime law, based, as Lord Tenterden observed, on the consideration that the actual employment of ships is "a matter, not merely of private advantage to the owners, but of public benefit to the state," and recognized in the decisions and the rules of this court, courts of admiralty, when the part-owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority, to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. Abbott on Shipping, pt. 1, ch. 3, §§ 2, 3; The Steamboat Orleans, 11 Pet. 175, 183, 9 L. Ed. 677; Rule 20 in Admiralty, 3 How. vii.; The Marengo, 1 Low. 52, Fed. Cas. No. 9,065. If the part-owners are equally divided in opinion upon the manner of employing the ship, then, according to the general maritime law, recognized and applied by Mr. Justice Washington, the ship may be ordered to be sold and the proceeds distributed among them. The Seneca, 18 Am. Jur. 485; s. c. 3 Wall. Jr. 395, Fed, Cas. No. 12,670. See, also, Story on Partnership, § 439; The Nelly Schneider, 3 P. D. 152.

But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us. The right to the use of running water is publici juris, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reason-

able use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury so done them, or even have the dam abated. Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury.

This view of the principle upon which general mill acts rest has been fully and clearly expounded in the judgments delivered by Chief Justice Shaw in the Supreme Judicial Court of Massachusetts. In delivering the opinion of the court in a case decided in 1832, he said: "The statute of 1796 is but a revision of a former law, and the origin of these regulations is to be found in the provincial statute of 1714. They are somewhat at variance with that absolute right of dominion and enjoyment which every proprietor is supposed by law to have in his own soil; and in ascertaining their extent it will be useful to inquire into the principle upon which they are founded. We think they will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property, which is often so situated that it could not be beneficially used without the aid of this power. A stream of water often runs through the lands of several proprietors. One may have a sufficient mill-site on his own land, with ample space on his own land for a mill-pond or reservoir, but yet, from the operation of the well-known physical law that fluids will seek and find a level, he cannot use his own property without flowing the water back more or less on the lands of some other proprietor. We think the power given by statute was intended to apply to such cases, and that the legislature meant to provide that, as the public interest in such case coincides with that of the mill-owner, and as the mill-owner and the owner of lands to be flowed cannot both enjoy their full rights, without some interference, the latter shall yield to the former, so far that the former may keep up his mill and head of water, notwithstanding the damage done to the latter, upon payment of an equitable compensation for the real damage sus-

tained, to be ascertained in the mode provided by the statute." "From this view of the object and purpose of the statute, we think it quite manifest that it was designed to provide for the most useful and beneficial occupation and enjoyment of natural streams and watercourses, where the absolute right of each proprietor to use his own land and water privileges, at his own pleasure, cannot be fully enjoyed, and one must of necessity, in some degree, yield to the other." Fiske v. Framingham Manufacturing Co., 12 Pick. (Mass.) 68, 70–72. * * *

Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other states, maintaining the validity of general mill acts as taking private property for public use, in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which without some such regulation could not be beneficially used. The statute does not authorize new mills to be erected to the detriment of existing mills and mill privileges. And by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557. * * *

Judgment affirmed.

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## COMMONWEALTH v. STRAUSS.

(Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 545, 78 N. E. 136, 11 L. R. A. [N. S.] 968, 6 Ann. Cas. 842.)

[Exceptions to indictment. A Massachusetts statute criminally forbade any person doing business in the state to make it a condition of the sale of goods that the purchaser should not deal in the goods of any other person; with certain exceptions regarding exclusive agents and selling territory. Strauss, agent for the Continental Tobacco Company, sold plug tobacco on condition that if the purchaser dealt in the goods of no other tobacco manufacturer a rebate of six per cent. would be returned. The prices asked for tobacco made the receipt of this rebate practically necessary in order to secure a profit to the retailer. Defendant, being convicted under this statute, alleged exceptions.]

KNOWLTON, C. J. * * * The rights relied upon under the fourteenth amendment to the Constitution of the United States, and under the Declaration of Rights in the Constitution of Massachusetts, are substantially the same, namely the right of every per-

son to his life, liberty and property, including freedom to use his faculties in all lawful ways, "to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." See Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431 (41 L. Ed. 832). * * *

There is no doubt that the statute before us puts a limitation upon the general right to make contracts. The contention of the commonwealth is that this limitation is valid as an exercise of the police power. The nature of the police power and its extent, as applied to conceivable cases, cannot easily be stated with exactness. It includes the right to legislate in the interest of the public health, the public safety and the public morals. If the power is to be held within the limits of the field thus defined, the words should be interpreted broadly and liberally. If we are to include in the definition, as many judges have done, the right to legislate for the public welfare, this term should be defined with some strictness, so as not to include everything that might be enacted on grounds of mere expediency. In the every late case of Lochner v. New York, 198 U. S. 45, 53, 25 Sup. Ct. 539, 541, 49 L. Ed. 937, 3 Ann. Cas. 1133, the majority of the court said, "Those powers, broadly stated, and without at present any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public." In the opinion in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, 701, 16 Sup. Ct. 714, 723 (40 L. Ed. 849) we find this language: "The general rule holds good, that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and within legislative control, and in the exertion of such power the Legislature is vested with a large discretion, which if exercised for the protection of the public, is beyond the reach of judicial inquiry."

It becomes necessary to look somewhat critically at the statute before us, to discover its effect upon the rights of contracting parties, and the purpose of the Legislature in enacting it. In the sale of goods to be resold it forbids one kind of contract which might be made in competition with other sellers of similar goods. It leaves open every other kind of contract. We may infer that the Legislature was providing for cases in which this particular kind of contract would be unfair competition as against weaker dealers, and would be injurious to the public as tending to crush ordinary competitors, and thus create a monopoly, from which the community as consumers would ultimately suffer. If, at the time of the enactment of this statute, there were dangers of this kind confronting the people of the commonwealth, and if this prohibition is a reasonable way of averting such dangers, we find justification for the

legislation, unless it involves a serious injury to those who are restrained by it. It permits every kind of contract of sale but one. It does not prohibit the appointment of agents, or sole agents, for the sale of property. It allows contracts for the exclusive sale of goods, wares or merchandise. The contracts that it forbids are only those which, in ordinary competition among equals, no one would have any interest or desire to make. As a rule, it is only a person or corporation that is intrenched in a position of power that can afford to say to a retailer or jobber, "I will not let you have my goods unless you will agree to sell none furnished by others." One who controls the sources of supply of goods, which are in such demand that a dealer cannot afford to be without them, can safely say to a purchaser "You must give me all your trade if you want to sell any of my goods." In that way he may be able to obtain a complete monopoly of the trade in goods such as he supplies.

The evidence in this case illustrates some of the tendencies of the times. The defendant's employer, the Continental Tobacco Company, is incorporated with a capital stock of $75,000,000. At the time of the sales for which the defendant is indicted it had absorbed more than 12 establishments used for the manufacture and sale of plug tobaccos, and owned by as many proprietors. Before its incorporation there was free and open competition in the plug tobacco market in Massachusetts. It so consolidated and restricted the trade that, in January, 1904, it produced about 95 per cent. of the plug tobacco, and about 80 per cent. of the cut plug tobacco in Massachusetts. Conditions were about the same in all parts of the state. There were about 210 jobbers in Massachusetts, and practically all stopped buying of independent manufacturers when this corporation made this new proposition, presented by the defendant in making the sales complained of. It had acquired such strength in its own field that, by the use of such means as the statute forbade, it could expect easily to obtain a practical monopoly of the plug tobacco trade in Massachusetts. This evidence furnishes an illustration of what we fairly may assume was being done, or might be expected to be done, in the manufacture and sale of other products, even of some of the necessaries of life. Tobacco is not one of the necessaries of life, but its use is so common that to many persons it seems almost as necessary as food. The poor much more than the rich would be likely to be affected by the monopoly of the market for plug tobacco, and a rise in the price which might be expected to follow it.

This statute was not enacted for protection in the purchase of any one kind of property. Its object doubtless was to prevent the use of this particular method of crushing competitors in any kind of trade in which the public might be interested. Especially was it important to prevent monopoly in the sale of the necessaries of

life. In view of this, we deem it not unreasonable that the statute was made to apply to sales of all kinds of goods.

Legislation should be adapted to existing conditions. A few years ago there was no occasion for such an enactment. But lately we see great aggregations of capital formed to obtain command, if possible, of the field of production or distribution into which they enter. Even now, in the transaction of business among equals where there is free competition, the statute is unnecessary, for there is no inducement to do that which it forbids. Its practical effect is to prevent great corporations from making a certain kind of contracts intended to drive ordinary competitors out of business.

The question is whether, at the time of the passage of this statute, there were conditions actually existing or reasonably anticipated which called for such legislative intervention in the interest of the general public. We are of opinion that there were, and that, in a broad and liberal sense of the words, this statute was enacted in the interest of the public health and the public safety, if not of the public morals. Certainly the purpose of the Legislature was to promote the general welfare of the public. We cannot say that this legislative action was not a legitimate exercise of the police power. Its invasion of the general right to make contracts is so slight, and in a field so remote from ordinary mercantile transactions, that there is little ground of objection on that score. The abuse at which the statute is aimed, while not practiced by many persons, is real and widely pervasive. * * *

Exceptions overruled.

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## YICK WO v. HOPKINS.

**(Supreme Court of United States, 1886. 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.)**

[Error to the Supreme Court of California. An ordinance of San Francisco forbade any person to carry on a laundry within the city without the consent of the board of supervisors, except in buildings of brick or stone. Yick Wo, a native of China, who had conducted a laundry in a certain wooden building in that city for 22 years, and who had there complied with all existing regulations for the prevention of fire and the protection of health, was refused such consent by said board, upon his application; and he was later convicted and imprisoned by order of the local police court for conducting his laundry without such consent. The state Supreme Court denied his petition for a writ of habeas corpus. One Wo Lee, in a similar situation, was denied a writ of habeas corpus by the United States Circuit Court, in California. Yick Wo took a

writ of error, and Wo Lee an appeal. Other facts appear in the opinion.]

Mr. Justice MATTHEWS. * * * These ordinances * * * seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. * * *

The ordinance * * * does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature. * * *

The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to

any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. * * *

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the fourteenth amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * * *

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an

administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259, 23 L. Ed. 543, Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550, In re Virginia, 100 U. S. 339, 25 L. Ed. 676, Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, and Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the fourteenth amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged.

Judgment reversed.

# POWER OF TAXATION

## I. Independence of Federal and State Governments [1]

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### McCULLOCH v. MARYLAND.

**(Supreme Court of United States, 1819. 4 Wheat. 316, 4 L. Ed. 579.)**

[The facts and first part of the opinion appear ante, p. 77. The remainder, dealing with the power of Maryland to tax the local United States branch bank, follows:]

Mr. Chief Justice MARSHALL. * * * That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded

[1] For discussion of principles, see Black, Const. Law (3d Ed.) § 159.

by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. * * *

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the

legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legiti-

mate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise. But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the

custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction betwen property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. * * *

[After referring to the arguments of the "Federalist":] It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not

supreme. But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Judgment reversed.

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## THE COLLECTOR v. DAY.

(Supreme Court of United States, 1871. 11 Wall. 113, 20 L. Ed. 122.)

[Error to the federal Circuit Court for Massachusetts. Federal statutes of 1864–67 levied a 5 per cent. tax upon all incomes of residents of the United States over $1,000. Day, a Massachusetts probate judge, was assessed upon his judicial salary, and, paying the tax under protest, sued to recover it back from the collector. From a judgment for Day this writ was taken.]

Mr. Justice NELSON. The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In Dobbins v. Commissioners of Erie County, 16 Pet. 435, 10 L. Ed. 1022, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or oth-

erwise by the states, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt. * * * We shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a state. * * *

The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states. * * * Upon looking into the Constitution, it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the states.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the states. The Constitution guarantees to the states a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the states under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen states were in the pos-

session of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remained unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the states?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the federal officer in Dobbins v. Commissioners of Erie from taxation by the state; for, in this respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of

another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion? * * *

Judgment affirmed.

[BRADLEY, J., gave a dissenting opinion.]

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CALIFORNIA v. CENTRAL PACIFIC RAILROAD COMPANY (1888) 127 U. S. 1, 40, 41, 8 Sup. Ct. 1073, 1080, 32 L. Ed. 150, Mr. Justice BRADLEY (holding invalid a tax levied by California upon franchises to construct and operate a railroad conferred by act of Congress upon a California corporation):

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the state. They were granted to the company for national purposes, and to subserve national ends. It seems very clear that the state of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated with the state. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law, Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Comm. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty."

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## RAILROAD COMPANY v. PENISTON.

(Supreme Court of United States, 1873. 18 Wall. 5, 21 L. Ed. 787.)

[Appeal from federal Circuit Court for Nebraska. In 1862 Congress incorporated the Union Pacific Railroad Company to build a railroad between the Missouri river and the Pacific coast, which, as constructed, crossed Nebraska from east to west. Nebraska became a state in 1867, and in 1869 taxed all of the property of the said railroad within the state. The company resisted that portion of the tax imposed in Lincoln county, and its bill for an injunction was denied in the above court. Other facts appear in the opinion.]

Mr. Justice STRONG. * * * Before the adoption of the Constitution of the United States, each of the states possessed unlimited power to tax, either directly or indirectly, all persons and property within [its] jurisdiction. * * * The Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws. * * *

There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the states. While it is true that government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes the direct effect of which shall be to hinder the exercise of any powers

which belong to the national government. The Constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.

These observations are directly applicable to the case before us. It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the general government constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to state taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the national government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit despatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. * * *

The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the general government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may

appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

Admitting, then, fully, as we do, that the company is an agent of the general government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from state taxation?

In Thomson v. Union Pacific Railway Company, 9 Wall. 579, 19 L. Ed. 792, after much consideration, we held that the property of that company was not exempt from state taxation, though their railroad was part of a system of roads constructed under the direction and authority of the United States, and largely for the uses and purposes of the general government. * * * A state tax upon the property of the company, its roadbed, rolling-stock, and personalty in general, was ruled by this court not to be in conflict with the federal Constitution. It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited.

It is, however, insisted that the case of Thomson v. Union Pacific Railroad Company differs from the case we have now in hand in the fact that it was incorporated by the territorial Legislature and the Legislature of the state of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which

was applied in the former case. * * * The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the states cannot obstruct the exercise of national powers. As was said in Weston v. Charleston, 2 Pet. 467, 7 L. Ed. 481, they cannot, by taxation or otherwise, "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a state Legislature.

Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. * * * In [McCulloch v. Maryland, ante, p. 274] the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the Chief Justice, to a tax paid by the real property of the bank, in common with the other real property in the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the state. * * *

In Osborn v. Bank [9 Wheat. 738, 6 L. Ed. 204] the tax held unconstitutional was a tax upon the existence of the bank—upon its right to transact business within the state of Ohio, * * * but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in McCulloch v. Maryland, a difference was pointed out between a tax upon its property and one upon its action. * * * This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All state taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a state to impose. * * *

It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or

upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers.

In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thomson v. Union Pacific. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of despatches, nor the transportation of United States mails, or troops, or munitions of war, that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication. * * *

Decree affirmed.

[SWAYNE, J., gave a concurring opinion. BRADLEY, J., gave a dissenting opinion, in which FIELD, J., concurred. HUNT, J., also dissented.]

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FLINT v. STONE TRACY CO. (1911) 220 U. S. 107, 152, 153, 155–158, 171, 172, 31 Sup. Ct. 342, 349, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, Mr. Justice DAY (upholding a federal excise tax, equivalent to 1 per cent. of its net income above $5,000, levied upon the doing of business in the United States by any corporation or joint stock company):

"It is next contended that the attempted taxation is void because it levies a tax upon the exclusive right of a state to grant corporate franchises, because it taxes franchises which are the creation of the state in its sovereign right and authority. This proposition is rested upon the implied limitation upon the powers of national and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. It has been held in a number of cases that the state cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental functions of the United States. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204; Union P. R. Co. v. Peniston,

18 Wall. 5, 21 L. Ed. 787; California v. Central P. R. Co., 127 U. S. 1, 32 L. Ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. 1073.

"An examination of these cases will show that in each case where the tax was held invalid, the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the federal government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers.

"In Osborn v. Bank of United States, supra, a leading case upon the subject, whilst it was held that the Bank of the United States was not a private corporation, but a public one, created for national purposes, and therefore beyond the taxing power of the state, Chief Justice Marshall, in delivering the opinion of the court, conceded that if the corporation had been originated for the management of an individual concern, with private trade and profit for its great end and principal object, it might be taxed by the state. * * * [Here follows a quotation from this case, 9 Wheat. at 859, 860.]

"While the tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises, it becomes necessary to consider in this connection the right of the federal government to tax the activities of private corporations which arise from the exercise of franchises granted by the state in creating and conferring powers upon such corporations. We think it is the result of the cases heretofore decided in this court, that such business activities, though exercised because of state-created franchises, are not beyond the taxing power of the United States. * * * [Citing Mich. C. Ry. v. Slack, 100 U. S. 595, 25 L. Ed. 647; U. S. v. Erie Ry., 106 U. S. 327, 1 Sup. Ct. 223, 27 L. Ed. 151; Spreckels Ref. Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.] The question was raised and decided in the case of Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482. In that well-known case a tax upon the notes of a state bank issued for circulation was sustained. Mr. Chief Justice Chase, in the course of the opinion, said:

"'Is it, then, a tax on a franchise granted by a state, which Congress, upon any principle exempting the reserved powers of the states from impairment by taxation, must be held to have no authority to lay and collect?

"'We do not say that there may not be such a tax. It may be admitted that the reserved rights of the states, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a state are necessarily exempt

from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property.

"'But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the state as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the state which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.' (Pp. 547, 548.)

"It is true that the decision in the Veazie Bank Case was also placed, in a measure, upon the authority of the United States to control the circulating medium of the country, but the force of the reasoning which we have quoted has not been denied or departed from. * * * [Here follow references to Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481, and Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786.]

"When the Constitution was framed, the right to lay excise taxes was broadly conferred upon the Congress. At that time very few corporations existed. If the mere fact of state incorporation, extending now to nearly all branches of trade and industry, could withdraw the legitimate objects of federal taxation from the exercise of the power conferred, the result would be to exclude the national government from many objects upon which indirect taxes could be constitutionally imposed. Let it be supposed that a group of individuals, as partners, were carrying on a business upon which Congress concluded to lay an excise tax. If it be true that the forming of a state corporation would defeat this purpose, by taking the necessary steps required by the state law to create a corporation and carrying on the business under rights granted by a state statute, the federal tax would become invalid and that source of national revenue be destroyed, except as to the business in the hands of individuals or partnerships. It cannot be supposed that it was intended that it should be within the power of individuals acting under state authority to thus impair and limit the exertion of authority which may be essential to national existence.

"In this connection South Carolina v. United States, 199 U. S.

437, 461, 50 L. Ed. 261, 26 Sup. Ct. 110, 4 Ann. Cas. 737, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the federal government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly governmental character, and did not extend to those used by the state in carrying on business of a private character.

"The cases unite in exempting from federal taxation the means and instrumentalities employed in carrying on the governmental operations of the state. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, cannot be taxed by the federal government. The Collector v. Day, 11 Wall. 113, 20 L. Ed. 122; United States v. Baltimore & O. R. Co., 17 Wall. 322, 21 L. Ed. 597; Ambrosini v. United States, 187 U. S. 1, 47 L. Ed. 49, 23 Sup. Ct. 1, 12 Am. Crim. Rep. 699.

"But this limitation has never been extended to the exclusion of the activities of a merely private business from the federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the states. We therefore reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a state in the creation of private corporations does not exempt it from the exercise of federal authority to levy excise taxes upon such privileges. * * *

"We come to the question, Is a so-called public-service corporation, such as the Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of South Carolina v. United States, 199 U. S. 437, 50 L. Ed. 261, 26 Sup. Ct. 110, 4 Ann. Cas. 737, this court held that when a state, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies of the state, carrying on the traffic, from the operation of the internal revenue laws of the United States. If a state may not thus withdraw from the operation of a federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the federal right to reach such properties and activities for the purposes of revenue.

"It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water, and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such

enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

"The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate federal taxation. Applying this principle, we are of opinion that the so-called public-service corporations represented in the cases at bar are not exempt from the tax in question."

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## II. Jurisdiction and Public Purpose [2]

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### UNION REFRIGERATOR TRANSIT CO. v. KENTUCKY.

(Supreme Court of United States, 1905. 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493.)

[Error to the Court of Appeals of Kentucky. The defendant company, a Kentucky corporation, was sued by that state for the ad valorem property taxes assessed for certain years upon 2,000 freight cars owned by it and rented to shippers, who took possession of them from time to time at Milwaukee, Wis., and used them to carry freight in various parts of the United States, Canada, and Mexico. According to a system of averages based upon gross earnings, only from 30 to 70 of such cars were employed yearly in Kentucky. The state Court of Appeals directed a judgment against the company for taxes upon all of its cars.]

Mr. Justice BROWN. In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other states, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the fourteenth amendment.

Section 4020 of the Kentucky Statutes, under which this assessment was made, provides that "all real and personal estate within

[2] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 160, 161, 163, 164.

this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, * * * shall be subject to taxation." * * *

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. Ed. 88; State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L. Ed. 179; Tappan v. Merchants' Nat. Bank, 19 Wall. 490–499, 22 L. Ed. 189–193; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. Ed. 1077, 1083, 25 Sup. Ct. 669. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. 581, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the fourteenth amendment. See also Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. Ed. 616, 618; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. Ed. 489, 495, 17 Sup. Ct. 130; Mt. Hope Cemetery v. Boston, 158 Mass. 509, 519, 35 Am. St. Rep. 515, 33 N. E. 695.

Most modern legislation upon this subject has been directed (1) to the requirement that every citizen shall disclose the amount of his property subject to taxation, and shall contribute in proportion to such amount; and (2) to the avoidance of double taxation. As said by Adam Smith in his Wealth of Nations, book V, chap. 2, pt. 2, p. 371: "The subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; Thomas v. Gay, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. 340; Louisville & N. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430, 49 L. Ed. 819, 25 Sup. Ct. 466. Subject to these individual exceptions, the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187. It is often said protection and payment of taxes are correlative obligations.

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has been defended by any court. It is said by this court in the State Tax on Foreign-Held Bonds Case, 15 Wall. 300–319, 21 L. Ed. 179–187, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real es-

tate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385–396, 47 L. Ed. 513–518, 23 Sup. Ct. 463: "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government,—namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also McCulloch v. Maryland, 4 Wheat. 316–429, 4 L. Ed. 579–607; Hays v. Pacific Mail S. S. Co., 17 How. 596–599, 15 L. Ed. 254, 255; St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 429, 431, 20 L. Ed. 192, 194, 195; Morgan v. Parham, 16 Wall. 471–476, 21 L. Ed. 303, 304.

Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim "mobilia sequuntur personam," and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Bonaparte v. Appeal Tax Court, 104 U. S. 592, 26 L. Ed. 845; Sturges v. Carter, 114 U. S. 511, 29 L. Ed. 240, 5 Sup. Ct. 1014; Kidd v. Alabama, 188 U. S. 730, 47 L. Ed. 669, 23 Sup. Ct. 401; Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439, 23 Sup. Ct. 277.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. Of course, we do not enter into a consideration of the question, so much discussed by political economists, of the double taxation involved in taxing the property from which these securities arise, and also the burdens upon such property, such as mortgages, shares of stock, and the like,—the securities themselves.

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument

for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a state other than that of its owner, is taxable there. Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 3 Interest. Com. R. 595, 11 Sup. Ct. 876. * * *

[Here follows the citation of other federal cases and a discussion of various state decisions.]

But there are two recent cases in this court which we think completely cover the question under consideration, and require the reversal of the judgment of the state court. The first of these is that of the Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. Ed. 513, 23 Sup. Ct. 463. That was an action to recover certain taxes imposed upon the corporate franchise of the defendant company, which was organized to establish and maintain a ferry between Kentucky and Indiana. The defendant was also licensed by the state of Indiana. We held that the fact that such franchise had been granted by the commonwealth of Kentucky did not bring within the jurisdiction of Kentucky, for the purpose of taxation, the franchise granted to the same company by Indiana, and which we held to be an incorporeal hereditament, derived from and having its legal situs in that state. It was adjudged that such taxation amounted to a deprivation of property without due process of law, in violation of the fourteenth amendment; as much so as if the state taxed the land owned by that company; and that the officers of the state had exceeded their power in taxing the whole franchise without making a deduction for that obtained from Indiana, the two being distinct, "although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways."

The other and more recent case is that of the Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. 669. That was an assessment upon the capital stock of the railroad company, wherein it was contended that the assessor should have deducted from the value of such stock certain coal mined in Pennsylvania and owned by it, but stored in New York, there awaiting sale, and beyond the jurisdiction of the commonwealth at the time appraisement was made. This coal was taxable, and in fact was taxed, in the state where it rested for the purposes of sale at the time when the appraisement in question was made. Both this court and the supreme court of Pennsylvania had held that a tax on the corporate stock is a tax on the assets of the corporation issuing such stock. The two courts agreed in the gen-

eral proposition that tangible property permanently outside of the state, and having no situs within the state, could not be taxed. But they differed upon the question whether the coal involved was permanently outside of the state. In delivering the opinion it was said: "However temporary the stay of the coal might be in the particular foreign states where it was resting at the time of the appraisement, it was definitely and forever beyond the jurisdiction of Pennsylvania. And it was within the jurisdiction of the foreign states for purposes of taxation, and, in truth, it was there taxed. We regard this tax as, in substance and in fact, though not in form, a tax specifically levied upon the property of the corporation, and part of that property is outside and beyond the jurisdiction of the state which thus assumes to tax it." The decision in that case was really broader than the exigencies of the case under consideration require, as the tax was not upon the personal property itself, but upon the capital stock of a Pennsylvania corporation, a part of which stock was represented by the coal, the value of which was held should have been deducted.

The adoption of a general rule that tangible personal property in other states may be taxed at the domicil of the owner involves possibilities of an extremely serious character. Not only would it authorize the taxation of furniture and other property kept at country houses in other states or even in foreign countries, of stocks of goods and merchandise kept at branch establishments, when already taxed at the state of their situs, but of that enormous mass of personal property belonging to railways and other corporations, which might be taxed in the state where they are incorporated, though their charter contemplated the construction and operation of roads wholly outside the state, and sometimes across the continent; and when, in no other particular, they are subject to its laws and entitled to its protection. The propriety of such incorporations, where no business is done within the state, is open to grave doubt; but it is possible that legislation alone can furnish a remedy. * * *

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same state, which are controlled by different considerations. * * *

Judgment reversed.

[WHITE, J., concurred in the result.]

Mr. Justice HOLMES. It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the fourteenth amendment; and as the CHIEF JUSTICE feels the same difficulty, I think it proper to say that my doubt has not been removed.

## LOAN ASSOCIATION v. TOPEKA.

(Supreme Court of United States, 1875. 20 Wall. 655, 22 L. Ed. 455.)

[Error to the federal Circuit Court for Kansas. The city of Topeka, Kansas, under statutory authority, issued $100,000 of bonds as a donation to the King Bridge Company to aid it in establishing a manufactory of iron bridges in that city. The plaintiff association of Cleveland, Ohio, sued Topeka in the federal Circuit Court for Kansas for the interest on some of these bonds owned by plaintiff. The city demurred and received judgment, and a writ of error was taken. Other facts appear in the opinion.]

Mr. Justice MILLER. * * * [After declining to pass upon one of the grounds urged for invalidating the bonds under the Kansas constitution:] We find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court. That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interest and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution. If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. * * *

We proceed to the inquiry whether such a power exists in the

legislature of the state of Kansas. * * * The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D; or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting v. Fond du Lac, 25 Wis. 188, 3 Am. Rep. 30; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. State of Maryland, 4 Wheat. 431, 4 L. Ed. 579, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Constitutional Limitations, 479. Coulter, J., in Northern Liberties v. St. John's Church, 13 Pa. 104 (see also Pray v. Northern Liberties, 31 Pa. 69; Matter of Mayor of New York, 11 Johns. [N. Y.] 77; Camden v. Allen, 26 N. J. Law, 398; Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Hanson v. Vernon, 27 Iowa, 47, 1 Am. Rep. 215; Whiting v. Fond du Lac, 25 Wis. 188, 3 Am. Rep. 30), says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treas-

ury to the importunities of two-thirds of the business men of the city or town. * * *

Judgment affirmed.

[CLIFFORD, J., gave a dissenting opinion.]

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## FALLBROOK IRRIGATION DISTRICT v. BRADLEY.

(Supreme Court of United States, 1896. 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.)

[Appeal from the federal Circuit Court for the Southern District of California. The statutes of California (further stated in the opinion below) provided for the organization of irrigation districts, the irrigation works in which were to be provided for by taxation upon all the real property in the district according to its value. Such a district was formed, including within it the land of Mrs. Bradley, a subject of Great Britain resident in California. She refused to pay the tax assessed against the land under this statute, and filed a bill in the above-mentioned court to enjoin the giving of a deed for said land when sold for non-payment of said tax. The injunction issued and the Irrigation District appealed. Other facts appear in the opinion.]

Mr. Justice PECKHAM. * * * Coming to a review of these various objections, we think the first, that the water is not for a public use, is not well founded. The question what constitutes a public use has been before the courts of many of the states, and their decisions have not been harmonious; the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others.

There is no specific prohibition in the federal Constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided. Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; Thorington v. Montgomery, 147 U. S. 490, 13 Sup. Ct. 394, 37 L. Ed. 252. In the fourteenth amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the

taking is under the authority of the state, instead of the federal, government.

Is this assessment for the nonpayment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and judicial branches of the state government. * * * [Here follow the quotation of various constitutional and statutory provisions, and the citation of] Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Irrigation Dist. v. De Lappe, 79 Cal. 351, 21 Pac. 825; In re Madera Irrigation Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106. * * *

It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned.

To provide for the irrigation of lands in states where there is no color of necessity therefor, within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and the occasion for the irrigation of the lands, than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own state. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that state on this question.

Viewing the subject for ourselves, and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California.

The use must be regarded as a public use, or else it would seem

to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance, and over or through private property, which cannot be taken in invitum if the use to which it is to be put be not public; and, if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. Cole v. La Grange, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896. A private company or corporation, without the power to acquire the land in invitum, would be of no real benefit; and, at any rate, the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual. No one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and, unless they had the power of eminent domain, they could accomplish nothing. If that power could be conferred upon them, it could only be upon the ground that the property they took was to be taken for a public purpose.

While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land,

he has the right to sell or assign the surplus or the whole of the water, as he may choose.

The method of the distribution of the water for irrigation purposes provided for in section 11 of the act is criticised as amounting to a distribution to individuals, and not to lands, and on that account it is claimed that the use for irrigation may not be achieved, and therefore the only purpose which could render the use a public one may not exist. This claim we consider not well founded in the language and true construction of the act. It is plain that some method for apportioning the use of the water to the various lands to be benefited must be employed, and what better plan than to say that it shall be apportioned ratably to each landowner upon the basis which the last assessment of such owner for district purposes within the district bears to the whole sum assessed upon the district? Such an apportionment, when followed by the right to assign the whole or any portion of the waters apportioned to the landowner, operates with as near an approach to justice and equality as can be hoped for in such matters, and does not alter the use from a public to a private one. This right of assignment may be availed of also by the owner of any lands which, in his judgment, would not be benefited by irrigation, although the board of supervisors may have otherwise decided. We think it clearly appears that all who, by reason of their ownership of or connection with any portion of the lands, would have occasion to use the water, would, in truth, have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public, because all persons have the right to use the water under the same circumstances. This is sufficient.

The case does not essentially differ from that of Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the federal constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That, indeed, is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Head v. Manufacturing Co., 113 U. S. 9, 22, 5 Sup. Ct. 441, 446, 28 L. Ed. 889; Wurts v. Hoagland, 114 U. S. 606, 611, 5 Sup. Ct. 1086, 1089, 29 L. Ed. 229; Cooley, Tax'n (2d Ed.) p. 617. If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished with-

out the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made, and the land rendered useful to all, and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent, or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.

Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that, in draining swamp lands, it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and the kind of land. Some of the swamp lands may not be nearly so wet and worthless as some others, and yet all may be so situated as to be benefited by the reclamation; and whether it is so situated or not must be a question of fact. The same reasoning applies to land which is, to some extent, arid, instead of wet. Indeed, the general principle that arid lands may be provided with water, and the cost thereof provided for by a general tax, or by an assessment for local improvement upon the lands benefited, seems to be admitted by counsel for the appellees. This, necessarily, assumes the proposition that water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use, and the assessment upon lands benefited is also levied for a public purpose. Taking all the facts into consideration, as already touched upon, we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.

2. The second objection urged by the appellees herein is that the operations of this act need not be, and are not limited to arid, unproductive lands, but include within its possibilities all lands, no matter how fertile or productive, so long as they are susceptible, "in their natural state," of one mode of irrigation from a common source, etc. The words "in their natural state" are interpolated in the text of the statute by the counsel for the appellees, on the assumption that the supreme court of California has thus construed the act in the Tregea Case, 88 Cal. 334, 26 Pac. 241. The objection had been made in that case that it was unlawful to include the city of Modesto in an irrigation district. The court, per Chief Justice Beatty, said that the legislature undoubtedly intended that cities and towns should in proper cases be included in irrigation districts, and that the act as thus construed did not violate the state Constitution. The learned chief justice also said:

"The idea of a city or town is, of course, associated with the existence of streets to a greater or less extent, lined with shops and

stores, as well as of dwelling houses; but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards, inside the corporate boundaries, requiring irrigation. It is equally notorious that in many districts lying outside of the corporate limits of any city or town, there are not only roads and highways, but dwelling houses, outhouses, warehouses, and shops. With respect to these things, which determine the usefulness of irrigation, there is only a difference of degree between town and country. * * * We construe the act to mean that the board may include in the boundaries of the district all lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation, at the same time that their value for other purposes may have been greatly enhanced." * * *

As an evidence of what can be done under the act, it is alleged in the complaint in this suit that the plaintiff is the owner of 40 acres of land in the district, and that it is worth $5,000, and that it is subject to beneficial use without the necessity of water for irrigation, and that it has been used beneficially for the past several years for purposes other than cultivation with irrigation. These allegations are admitted by the answer of the defendants, who nevertheless assert that, if a sufficient supply of water is obtained for the irrigation of the plaintiff's land, the same can be beneficially used for many purposes other than that for which it can be used without the water for irrigating the same.

What is the limit of the power of the legislature in regard to providing for irrigation? Is it bounded by the absolutely worthless condition of the land without the artificial irrigation? Is it confined to land which cannot otherwise be made to yield the smallest particle of a return for the labor bestowed upon it? If not absolutely worthless and incapable of growing any valuable thing without the water, how valuable may the land be, and to what beneficial use and to what extent may it be put, before it reaches the point at which the legislature has no power to provide for its improvement by that means? The general power of the legislature over the subject of providing for the irrigation of certain kinds of lands must be admitted and assumed. The further questions of limitation, as above propounded, are somewhat legislative in their nature, although subject to the scrutiny and judgment of the courts, to the extent that it must appear that the use intended is a "public use," as that expression has been defined relatively to this kind of legislation.

The legislature by this act has not itself named any irrigation district, and, of course, has not decided as to the nature and quality

of any specific lands which have been included in any such district. It has given a general statement as to what conditions must exist in order to permit the inclusion of any land within a district. The land which can properly be so included is, as we think, sufficiently limited in its character by the provisions of the act. It must be susceptible of one mode of irrigation, from a common source, and by the same system of works, and it must be of such a character that it will be benefited by irrigation by the system to be adopted. This, as we think, means that the amount of benefit must be substantial, and not limited to the creation of an opportunity to thereafter use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it had produced in reasonable quantities, and with ordinary certainty and success, without the aid of artificial irrigation. The question whether any particular land would be thus benefited is necessarily one of fact. * * * If land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much improved by it that it will be thereby, and for its original use, substantially benefited, and, in addition to the former use, though not in exclusion of it, if it can then be put to other and more remunerative uses, we think it erroneous to say that the furnishing of artificial irrigation to that kind of land cannot be, in a legal sense, a public improvement, or the use of the water a public use. * * *

Judgment reversed.

[FULLER, C. J., and FIELD, J., dissented.]

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## OPINION OF THE JUSTICES.

**(Supreme Judicial Court of Massachusetts, 1912. 211 Mass. 624, 98 N. E. 611, 42 L. R. A. [N. S.] 221.)**

[Answer to questions of the Massachusetts House of Representatives, set forth in the opinion below.]

OPINION (of all the Justices). The questions relate to the constitutionality of a bill entitled "An act to extend and define the duties of the Homestead Commission." The general scheme embodied in the proposed bill is that the commonwealth shall purchase land, and develop, build upon, rent, manage, sell and re-purchase the same. The Homestead Commission is clothed with the fullest power to go into the business of buying, renting and selling real estate. As expressed in the bill, its purpose is to provide homes "for mechanics, laborers, or other wage-earners," or as suggested by the amendment set forth in the second question, to improve "the public health by providing homes in the more thinly populated areas of the state for those who might otherwise live in the most congested areas of the state." In a constitutional sense

the difference between these two statements of purpose is not material in view of the actual provisions of the bill. The substance of it is that the commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers. It is not a plan for pauper relief. The question is whether this is a public use.

To this fundamental test must be brought all governmental activity in every system based upon reason rather than force. The dominating design of a statute requiring the use of public funds must be the promotion of public interests and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified. Government aid to manufacturing enterprises, the development of water powers and other natural resources by private persons or corporations with public funds, either through loans or by the more indirect method of exemption from taxation or taking of stock, have been universally condemned by courts throughout the country, although often attempted by legislation. The leading case is Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39, where a statute was considered authorizing the city of Boston to issue bonds for the raising of money to be lent to owners of real estate whose buildings had been destroyed in the devastation wrought by the Boston fire of 1872. This statement of the law by Mr. Justice Wells, at page 461 of 111 Mass., 15 Am. Rep. 39, hardly can be surpassed for accuracy and clearness:

"The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community and thus the public welfare may be ultimately benefited by their promotion."

This principle has been applied to a great variety of cases. It was amplified with a full citation of authorities in Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483.

The question, in its last analysis is one of taxation. Can the

commonwealth raise money by taxation for the purposes set forth in the act? * * *

[After referring to a provision permitting the use by the Homestead Commission of the savings bank deposits of unknown owners, untouched for 30 years, which a prior statute had required to be paid to the state to be kept for the owners:] [This] would be treating the money in substance as escheated. Even if it were escheated it then would be money in the treasury freed from any trust. Such money, however, is public money and can be appropriated only to public uses. It can no more be diverted for private benefit than can money raised by taxation. Simmons v. Hanover, 23 Pick. 188; Allen v. Marion, 11 Allen, 108.

Taxation is somewhat historical in its nature and can be most intelligently approached by comparison of those subjects which have been held to be a public use and those which have been held not to be a public use. It is not now open to question that the establishment and maintenance of water and sewerage systems and electric light and gas plants are public uses. They relate to commodities which are or have become universally necessary, and they cannot be procured by each individual or family acting separately, but require co-operation. As a practical matter provision for these necessities is monopolistic in character, and having due regard to the reasonable convenience of the public, there can be no competition respecting them. The permanently exclusive use of portions of the public ways is essential to the effective furnishing of these necessities. Highways are public in their nature, and their construction and repair are legitimate public expenses. Hence they cannot be appropriated to any use which is private. These necessities cannot be provided without the exercise of powers conferred only by the Legislature, and commonly require the exercise of eminent domain. Although water and artificial light are in a certain sense beneficial to individuals, their public functions are so overshadowing as to stamp them as proper subjects for state or municipal ownership. Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487.

On the other hand it was said in Opinions of the Justices, in 1893, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809, and again in 1903, 182 Mass. 605, 66 N. E. 25, that it was beyond the power of the Legislature to authorize cities and towns to engage in the business of furnishing coal or fuel to the public. The economic aspects of conducting business of this character through public instrumentalities are not for our consideration. Such a system is not possible under our Constitution. The grounds upon which these opinions were founded are that such enterprises are conducted by individuals. They are universally recognized as legitimate and proper fields for private and personal adventure. No legislative authority is required to engage in them, and no powers derived from

that source are needed for their prosecution. It is a natural right subject only to regulation by the police power. A person lawfully engaged in such business cannot be driven out by taxation to support his rival even though that rival be an arm of government.

The questions of the present order are closely analogous to those raised by the order of the honorable House considered in Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. It was said there in substance that it was not within the power of the Legislature to authorize the taking of land outside the limits of streets for the purpose of being leased or sold under such restrictions as would insure proper development of industrial and commercial facilities. Such purpose was said to be primarily for the aggrandizement of individuals and only incidentally for the promotion of the public weal. We are unable to distinguish the purchase, development, rental and sale of land in the manner provided by the present bill from the principles announced in these decisions and opinions and many others collected and somewhat reviewed in 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483.

Buying and selling land always has been freely exercised by all individuals who desired, under the Constitution. Proprietorship of his own home has been one of the chief elements of strength in the citizen, and widely diffused land ownership has conferred stability upon the state. It is matter of common knowledge that thousands of inhabitants of the commonwealth who are "mechanics, laborers or other wage-earners" have become, through industry, temperance and frugality, owners of the homes in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the state to aid others in acquiring a home whose temperament, environment or habits have heretofore prevented them from attaining a like position. Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage-earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage-earner. Neither the power of taxation nor of eminent domain goes to this extent. If the purpose is a public one, the property of every inhabitant, however improved or used, must yield to the superior right. But if the end to be gained is not public, no one can be compelled to contribute under either form of governmental power.

Ownership of a bit of land is one of the deep seated desires of mankind. The property resting on such proprietorship is among the dearest rights in the minds of many people secured by the

Constitution. If the power exists in the Legislature to take a tract of land away from one owner for the purpose of enabling another to get the same tract, the whole subject of such ownership becomes a matter of legislative determination and not of constitutional right.

Experiments in other lands, where the people have established either no bounds or fragile ones to the absolutism of governmental powers by a written constitution, afford no guide in the determination of what our Constitution permits.

It may be urged that the measure is aimed at mitigating the evils of overcrowded tenements and unhealthy slums. These evils are a proper subject for the exercise of the police power. Through the enactment of building ordinances, regulations and inspection as to housing and provision for light and air lies a broad field for the suppression of mischiefs of this kind.

Questions answered in the negative.

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## III. Classification for Taxation [3]

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### PEOPLE ex rel. HATCH v. REARDON.

(Court of Appeals of New York, 1906. 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. [N. S.] 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515.)

[Appeal from the Appellate Division of the Supreme Court of New York for the First Department. A New York statute of 1905 imposed a stamp tax, of two cents on each $100 of face value or fraction thereof, on all sales or transfers of shares of stock in associations or corporations. Non-payment of the tax was made a misdemeanor. One Hatch sold 100 shares of the Southern Railway Company of Virginia, at the market value of $30.75 a share, and 100 shares of the Chicago, Milwaukee & St. Paul Railroad Company of Wisconsin, at the market value of $172 a share. The face value of each of these shares was $100. Hatch was arrested for non-payment of the tax on these sales, and a writ of habeas corpus was issued for his release. The writ was dismissed by the Supreme Court and this was affirmed by the Appellate Division. Other facts appear in the opinion.]

VANN, J. * * * Second. The classification made by selecting one kind of property and taxing the transfer of that only, is assailed as so arbitrary, discriminating, and unreasonable as to deprive certain persons of their property without due process of law and to withhold from them the equal protection of the laws. All

[3] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 165, 166.

taxation is arbitrary, for it compels the citizen to give up a part of his property; it is generally discriminating, for otherwise everything would be taxed, which has never yet been done, and there would be no exemption on account of education, charity, or religion, and frequently it is unreasonable, but that does not make it unconstitutional, even if the result is double taxation. People v. Home Ins. Co., 92 N. Y. 328, 347. The right to tax is not granted by the Constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists "independently of it as a necessary attribute of sovereignty." People v. Adirondack Ry. Co., 160 N. Y. 225, 236, 54 N. E. 689, 692. "The power of taxation being legislative, all the incidents are within the control of the Legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment; the method of collection, and whether a tax shall be a charge upon both person and property, or only on the land—are matters within the discretion of the Legislature and in respect to which its determination is final." Genet v. City of Brooklyn, 99 N. Y. 296, 306, 1 N. E. 777, 783. "A tax may be imposed only on certain callings and trades, for when the state exerts its power to tax it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if the state could not tax any property or calling unless at the same time it taxed all property or all callings." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 562, 22 Sup. Ct. 431, 440, 46 L. Ed. 679; Armour Packing Co. v. Lacey, 200 U. S. 226, 235, 26 Sup. Ct. 232, 234, 50 L. Ed. 451. "We cannot say that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws." Otis v. Parker, 187 U. S. 606, 610, 23 Sup. Ct. 168, 170, 47 L. Ed. 323. "The Legislature must decide when and how and for what public purposes a tax shall be levied and must select the subjects of taxation." 1 Cooley on Taxation (3d Ed.) 255.

There is no express restriction upon this power in our state Constitution and no implied restriction, except by the primary guaranties relating to life, liberty, property and due process of law. The same is true of the federal Constitution except as to certain subjects of national interest under the control of Congress, such as imports, patent rights and agencies used to carry the powers of Congress into execution. Subject to these restraints, the Legislature has supreme control of the power to tax, and its action, even if arbitrary, discriminating and unreasonable, is binding upon all

persons and property within the boundaries of the state. The state retained all the power of legislation that it did not part with in adopting the federal Constitution or consenting to the amendment thereof, and subject to that exception, it is as supreme as the British Parliament, which is restrained only by the custom of the realm and the conservatism of the people. Taxes upon the right of succession to property by will and intestate law, on special franchises and upon the sale of intoxicating liquors, are recent instances of the exercise of this power by the state through the selection of special subjects of taxation, involving the exemption of all others, each of which was attacked as in violation of both Constitutions, but all were sustained by the courts. The tariff and internal revenue laws show that the same power of selection has been exercised by Congress, and the federal courts have uniformly upheld it. Indeed, the prototype of the statute before us was an act of Congress passed in 1898, known as the War Revenue Act (Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286]), imposing a stamp tax on sales, transfers and deliveries of stock certificates, which was sustained without dissent by the Circuit and Supreme Courts of the United States. United States v. Thomas (C. C.) 115 Fed. 207; Thomas v. United States, 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481. A like tax on sales of merchandise, although expressly limited to those made at "any exchange or board of trade," leaving all other sales untouched, was also sustained, and the declaration made that "a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation." Nicol v. Ames, 173 U. S. 509, 521, 19 Sup. Ct. 522, 527, 43 L. Ed. 786.

The Legislature has power to classify as it sees fit by imposing a heavy burden on one class of property and no burden at all upon others, the remedy for injudicious action being in the hands of the people, not of the courts. Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the state and federal courts. The tax on tobacco, on oleomargarine and the like is not less arbitrary or discriminating than the tax in question. While a tax upon a particular house, or horse, or the houses or horses of a particular man, or on the sale thereof, would obviously invade a constitutional right, still a tax upon all houses, leaving barns and business buildings untaxed, or upon all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the Legislature. This is true of a tax on all houses with "more than one chimney," or "with more than one hearthstone," or on all race horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation

are treated alike and the tax imposed equally upon all property of the class to which it belongs. Matter of McPherson, 104 N. Y. 306, 318, 10 N. E. 685, 58 Am. Rep. 502; Matter of Gould's Estate, 156 N. Y. 423, 427, 51 N. E. 287. The equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances." Kentucky R. R. Cases, 115 U. S. 321, 337, 6 Sup. Ct. 57, 63, 29 L. Ed. 414. Or, in other words, all persons must "be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293, 18 Sup. Ct. 594, 598, 42 L. Ed. 1037; Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; Barbier v. Connolly, 113 U. S. 27, 32, 5 Sup. Ct. 357, 28 L. Ed. 923. "Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state." 1 Cooley on Taxation (3d Ed.) 260.

The tax in question is not imposed upon property, but on the transfer of a certain class of property, extensively bought and sold throughout the state. It does not discriminate between different kinds of stocks, taxing the sale of some and leaving others untaxed, but treats all in the class alike. The class includes all sales of certificates issued by any domestic or foreign association, company, or corporation. It is a large and comprehensive class, as is shown by the revenue produced, which amounts to five or six millions per annum. The sales affected are made chiefly for speculation which may have influenced the Legislature in making the selection. The statute operates equally and uniformly upon all transfers of the class named when made by any person within the state. All persons who sell stocks are treated alike and all parts of the state are treated alike. It applies with equal force to all sales, whether in the city or country, in exchanges, offices or on the street, by farmers, mechanics, brokers, and others. The classification violates neither Constitution.

Third. It is claimed that the statute is invalid because it fixes the amount of the tax regardless of the value of the certificates sold or of the sum for which they are sold. The tax in question is an excise tax which need not depend upon any principle of valuation or on any notice to the taxpayer. * * * When a sale is made the tax follows, and the Legislature had the right to measure it in any way that it saw fit. A tax of two cents on every check, regardless of the amount for which it was drawn, and of five cents on a written contract, whether it covered a transaction involving hundreds or thousands, may be referred to as examples of what has been done without serious question in the imposition of excise taxes. A poll tax does not depend upon the income or earning

capacity of the persons subject to it. A tax on carriages, guns, and watches does not rest on the value of the subjects taxed. They are counted, not appraised. Hylton v. United States, 3 Dall. (U. S.) 171, 1 L. Ed. 556; Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892. The same is true of an excise tax on legal process, domestic animals, avocations, and the like of which there have been many instances during the history of the nation and the different states. Such powers of taxation, as was said in a late case, "have admittedly belonged to state and nation from the foundation of the government." Knowlton v. Moore, 178 U. S. 41, 60, 20 Sup. Ct. 747, 755, 44 L. Ed. 969. * * *

Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are permanent evidence of the sum paid. The statute itself in all such cases, as well as in the case under consideration, apportions the tax and the power of apportionment is part of the power of taxation. As was said by this court many years ago: "The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment, and the power of apportionment is, therefore, unlimited, unless it be restrained as a part of the power of taxation. There is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint." People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 427, 55 Am. Dec. 266. The highest federal court sustained without hesitation an assessment upon the nominal or face value of bonds instead of upon their actual value, and also declared that absence of notice to the owners of the bonds was not a taking of the bondholder's property without due process of law. Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; Jennings v. Coal Ridge Improvement & Coal Co., 147 U. S. 147, 13 Sup. Ct. 282, 37 L. Ed. 116. In the Thomas Case, precisely as in the case before us, the tax was measured by "each hundred dollars of face value or fraction thereof." As our Legislature has all the power of legislation with reference to taxation that the state has, of necessity it has as much power to classify and measure as belongs to Congress. Hence, this point, as well as the last preceding, was involved and decided in the Thomas Case even if no expression of consideration appears in the opinions. United States v. Thomas (C. C.) 115 Fed. 207; Thomas v. United States, 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481. We think that the apportionment, even when so unequal in result as it was in the two sales described in the affidavit of the complain-

ant, is within the exclusive control of the Legislature, with no power in the courts to interfere. * * *

Order affirmed.[4]

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## VILLAGE OF NORWOOD v. BAKER.

(Supreme Court of United States, 1898. 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443.)

[Appeal from the United States Circuit Court for Southern District of Ohio. Ohio cities and villages were empowered by statute to open streets, and to assess such part of the cost thereof as they pleased by the front foot upon property bounding and abutting thereon. A street 300 feet long and 50 feet wide was opened by the village of Norwood through a large tract of land owned by Ellen Baker, who, being the sole owner of all abutting property, was required under this statute to pay the whole cost thereof, including the expenses of condemnation proceedings. Baker obtained an injunction in the above-named Circuit Court against the enforcement of this assessment, as depriving her of due process of law under the fourteenth amendment, and this appeal was taken.]

Mr. Justice HARLAN. * * * Undoubtedly, abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property; such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar

[4] "While the Legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim, or caprice. There must be some support of taste, policy, difference of situation or the like; some reason for it, even if it is a poor one. While the state can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper, and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the state and those selling at retail within the state was sustained on the ground that the two occupations are distinct (Cook v. Marshall County, 196 U. S. 261, 274, 25 Sup. Ct. 233, 49 L. Ed. 471), but could dealers in any commodity be classified according to age, size, or complexion? A classification of sales into those made in an exchange and those made elsewhere was sustained in another case, but could exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786." —People ex rel. Farrington v. Mensching, 187 N. Y. 8, 18, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101 (1907), by Vann, J.

benefits accruing from public improvements. Mobile Co. v. Kimball, 102 U. S. 691, 703, 704, 26 L. Ed. 238; Railroad Co. v. Decatur, 147 U. S. 190, 202, 13 Sup. Ct. 293, 37 L. Ed. 132; Bauman v. Ross, 167 U. S. 548, 589, 17 Sup. Ct. 966, 42 L. Ed. 270, and authorities there cited. And, according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvement. In Williams v. Eggleston, 170 U. S. 304, 311, 18 Sup. Ct. 619, 42 L. Ed. 1047, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore, should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public

use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable; and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment. * * *

It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property.

The views we have expressed are supported by other adjudged cases, as well as by reason, and by the principles which must be recognized as essential for the protection of private property against the arbitrary action of government. The importance of the question before us renders it appropriate to refer to some of those cases.

In Agens v. Mayor, etc., of Newark, 37 N. J. Law, 416, 420–423, 18 Am. Rep. 729, the question arose as to the validity of an assessment of the expenses incurred in repairing the roadbed of a portion of one of the streets of the city of Newark. The assessment was made in conformity to a statute that undertook to fix, at the mere will of the legislature, the ratio of expense to be put upon the owners of property along the line of the improvement. Chief Justice Beasley, speaking for the court of errors and appeals, said: "The doctrine that it is competent for the legislature to direct the expense of opening, paving, or improving a public street, or at least some part of such expense, to be put as a special burthen on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the constitution of this state that requires that all property in the state, or in any particular subdivision of the state, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities are vindicated. But, while it is thus clear that the burthen of a particular tax may be placed exclusively on any political district to whose benefit such tax is to inure, it seems to me it is equally clear that, when such burthen is sought

to be imposed on particular lands, not in themselves constituting a political subdivision of the state, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burthen of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the lawmaking power to concentrate the burthen of tax upon specified property does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit, and the only inquiry is where that limit is to be placed."

After referring to a former decision of the same court, in which it was said that special assessments could be sustained upon the theory that the party assessed was locally and peculiarly benefited above the ordinary benefit which as one of the community he received in all public improvements, the opinion proceeds: "It follows, then, that these local assessments are justifiable on the ground above,—that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when a property is specified, out of which a public improvement is to be paid for

in excess of the value specially imparted to it by such improvement. As to such excess, I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen. When his land is sequestered for the public use, he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax." * * *

The present case is not one in which (as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments) it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum, as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. * * * [Parsons v. Dist. of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, and Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, are here discussed and held not inconsistent with this opinion.]

We have considered the question presented for our determination with reference only to the provisions of the national Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed "without deduction for benefits to any property of the owner," would be of little practical value, if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed, not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits.

The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any

special benefits accruing to the abutting property therefrom, to take private property for public use without compensation.

It is so ordered.

Mr. Justice BREWER, dissenting. * * * The suggestion that such an assessment be declared void, because the rule of assessment is erroneous, implies that it is prima facie erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement is prima facie void; that, being prima facie void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity canceling in toto the assessment, without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement.

In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited, or the amount of the benefit, was incorrect, or that other property was also benefited; and the opinion goes to the extent of holding that the legislative determination is not only not conclusive, but also is not even prima facie sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and, I think, should adhere to those oft-repeated rulings.

[GRAY and SHIRAS, JJ., also dissented.]

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## KELLY v. PITTSBURGH.

**(Supreme Court of United States, 1881. 104 U. S. 78, 26 L. Ed. 658.)**

[Error to the Supreme Court of Pennsylvania. By authority of the legislature, the township of Collins in Alleghany county was annexed to the city of Pittsburgh. Kelly owned 80 acres of land therein, which was assessed at a very high rate for the municipal taxes of the city. An injunction against the collection of such taxes was denied him in the lower courts, and the denial affirmed by the state Supreme Court. Other facts appear in the opinion.]

Mr. Justice MILLER. * * * The main argument for the plaintiff in error—the only one to which we can listen—is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or material-

ly different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which in regard to that matter, is, and always has been, due process of law. The tax in question was assessed, and the proper officers were proceeding to collect it in this way.

The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469.

But, passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is, that in the matter already mentioned the law itself is in conflict with the Constitution. It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of state legislation.

It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the

taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm lands in a city are not subject to the ordinary city taxes. It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those states and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455, which asserts the doctrine that taxation, though sanctioned by state statutes, if it be [not] for a public use, is an unauthorized taking of private property. We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for water-works, are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed. There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against the plaintiff in error is pointed out as intended for any other than a public use.

It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them? We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a state is deeply interested in the education of the

children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself. The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court-house and police-station than some others?

Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law. * * *

Judgment affirmed.

# RIGHT OF EMINENT DOMAIN

## I. In General [1]

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### FAIRCHILD v. ST. PAUL.

(Supreme Court of Minnesota, 1891. 46 Minn. 540, 49 N. W. 325.)

[Appeal by plaintiffs from a judgment of the Ramsey County District Court. The facts appear in the opinion.]

MITCHELL, J. This was an action to recover damages for certain alleged acts of trespass in removing stone from the premises of the plaintiffs. The defendant justified the acts on the ground that it had acquired a title to the land for the purposes of a public street. The case was tried upon the theory that its decision depended on the question whether or not the city of St. Paul had acquired a title in fee, and by stipulation it was agreed that the court should determine two questions, viz.: First, had the defendant the power and right to condemn the fee of land for street purposes? and, if so, second, had the defendant duly condemned, for such purposes, the fee of the land in question?

1. The main contention of the plaintiffs upon the argument was, to use their own language, "that the public exigencies do not demand the taking and condemnation of the absolute fee-simple title to land for the purpose of highways and streets; that the public wants are supplied by the enjoyment of an easement; and that any act of the legislature which assumes and attempts to authorize a municipality to take and condemn the absolute fee-simple title to land for such purposes is unconstitutional and void." More briefly stated, the proposition is that the legislature cannot authorize the taking of any greater estate in land for public use than is necessary; that an estate in fee is not necessary for the purposes of a street; therefore the legislature cannot authorize the taking of such an estate for such purposes. While we have given the question the careful examination due to the elaborate brief and very earnest argument of the learned counsel, yet it has never seemed to us that there was anything in his contention.

In this case it must be conceded that the legislature, if it had the power to do so, has given the city of St. Paul authority to condemn an estate in fee for street purposes; the language of the charter being: "In all cases the land taken and condemned in the manner aforesaid (for streets) shall be vested absolutely in the city of St. Paul in fee-simple." Mun. Code 1884, § 153 (Sp. Laws 1874, p.

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 172–175, 180.

59, § 17). There is nothing better settled than that, the power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the Constitution. It rests in the wisdom of the legislature to determine when and in what manner the public necessities require its exercise; and with the reasonableness of the exercise of that discretion the courts will not interfere. Wilkin v. First Div., etc., R. Co., 16 Minn. 271 (Gil. 244); Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155 (Gil. 139). As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain, so it is the exclusive judge of the amount of land, and of the estate in land, which the public end to be subserved requires shall be taken. The only limitation—at least, the only one applicable to a case like the present—which the Constitution imposes upon the exercise of the right of eminent domain by the legislature is that private property shall not be taken for public use without just compensation therefor first paid or secured. Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Consequently, if in the legislative judgment it is expedient to do so, it has the power expressly to authorize a municipal corporation compulsorily to acquire the absolute fee-simple to lands of private persons condemned for street or any other public purpose. The authorities are so numerous and uniform to this effect that an extended citation of them is unnecessary. See, however, Dill. Mun. Corp. § 589; Cooley, Const. Lim. 688; Lewis, Em. Dom. 277; Elliott, Roads & S. 172; Mills, Em. Dom. §§ 50, 51; Boom Co. v. Patterson, 98 U. S. 403, 406, 25 L. Ed. 206; Sweet v. Buffalo, etc., Ry. Co., 79 N. Y. 293, 299.

It is often laid down as the law that the taking of property must always be limited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that this is almost invariably said, not in discussing the extent of the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or a particular estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied. This distinction is clearly brought out by Justice Cornell in Milwaukee & St. Paul Ry. Co. v. City of Faribault, 23 Minn. 167. Upon the principle that statutes conferring compulsory powers to take

private property are to be strictly construed, it follows that, when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorized the taking of land for the purposes of streets, without defining the estate that may be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed, under such statutes, to be the extent of the grant of authority; but no well-considered case can be found which holds that the legislature might not authorize the taking of the fee, if it deemed it expedient. * * *

Judgment affirmed.

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## LONG ISLAND WATER SUPPLY CO. v. BROOKLYN.

(Supreme Court of United States, 1897. 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165.)

[Error to Supreme Court of New York. The Long Island Water Supply Company resisted the taking of its property, franchises, and contracts by eminent domain by the city of Brooklyn, for the reasons stated in the opinion below. The Court of Appeals upheld the judgment of the lower courts in favor of the condemnation, and the state Supreme Court entered final judgment against the company, from which this writ of error was taken.]

Mr. Justice BREWER. * * * The contention of plaintiff in error is that the proceedings had under the statute which resulted in the judgment of condemnation violate section 10, art. 1, of the Constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts, and were not "due process of law," as required by the fourteenth amendment.

With reference to the first part of this contention, it is said that in 1881 the town of New Lots made a contract with the water-supply company by which for each and every year during the term of 25 years it covenanted to pay to the company so much per hydrant for hydrants furnished and supplied by it; that the act of annexation continued the burden of this obligation upon the territory within the limits of the town, although thereafter the town, as a separate municipality, ceased to exist, and the territory became simply a ward of the city of Brooklyn; that the condemnation proceedings destroyed this contract, and released the territory from any obligation to pay the stipulated hydrant rental; that a state or municipality cannot do indirectly what it cannot do directly; that, as the municipality could not, by any direct act, release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation.

We cannot yield our assent to this contention. All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation. That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water-supply system must be recognized as within the unquestioned limits of the power of eminent domain. It matters not to whom the water-supply system belongs, individual or corporation, or what franchises are connected with it; all may be taken for public uses upon payment of just compensation. It is not disputed by counsel that, were there no contract between the company and the town, the waterworks might be taken by condemnation. And so the contention is, practically, that the existence of the contract withdraws the property, during the life of the contract, from the scope of the power of eminent domain, because taking the tangible property will prevent the company from supplying water, and therefore operate to relieve the town from the payment of hydrant rentals. In other words, the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken by it.

Such a decision would be far-reaching in its effects. There is probably no water company in the land which has not some subsisting contract with a municipality which it supplies, and within which its works are located; and a ruling that all those properties are beyond the reach of the power of eminent domain during the existence of those contracts is one which, to say the least, would require careful consideration before receiving judicial sanction. The fact that this particular contract is for the payment of money for hydrant rental is not vital. Every contract is equally within the protecting reach of the prohibitory clause of the Constitution. The charter of a corporation is a contract, and its obligations cannot be impaired. So it would seem to follow, if plaintiff in error's contention is sound, that the franchises of a corporation could not be taken by condemnation, because thereby the contract created by the charter is impaired. The privileges granted to the corporation are taken away, and the obligation of the corporation to perform is also destroyed. * * *

The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses. * * * The case of West River Bridge Co. v. Dix, 6 How. 507, 12 L. Ed. 535, is in point. * * * [This involved the condemnation of a toll bridge with an exclusive franchise and its conversion into a free bridge by the state of Vermont. The bridge company

took a writ of error to the federal Supreme Court, alleging the obligation of its franchise contract was impaired.] This contention was overruled, and in the course of the opinion it was observed:

"No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the 'eminent domain of the state,' is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise. * * * Now, it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the laws of nature, or nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition. * * * A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control, and actually to prohibit, the power and duty of the government to advance and

protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. It is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume (chapter 3, p. 20), of the Rights of Things."

See, also, Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71, 83, 14 L. Ed. 55; Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray (Mass.) 1, 35, 36. * * *

Judgment affirmed.

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## II. Public Purpose[2]

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### TALBOT v. HUDSON.

**(Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 417.)**

[Hearing, upon a bill and answer, of a motion to dissolve a temporary injunction issued ex parte by a single judge upon the filing of the bill. The pleadings disclosed that the plaintiffs owned valuable mill, dam, and water rights upon the Concord river, and had erected and were operating by the water power thereof large and valuable mills, and had acquired a legal right to flood certain tracts of territory by the backwater from their dams; that a statute had authorized commissioners to reduce the height of said dams 33 inches, with a view to draining extensive meadows along the Concord and Sudbury rivers now overflowed by said backwater, which would destroy or render almost valueless said water power, dams, and mills, though compensation was to be made therefor; and that defendants, as such commissioners, were proposing to act under this statute. Defendants also demurred to the bill, which alleged the unconstitutionality of the statute. Other facts appear in the opinion.]

BIGELOW, C. J. * * * It is quite obvious that the first step in this inquiry is to ascertain, if we can, under what head or branch of legislative power or authority the act in question falls. The intention of the legislature in this respect must be gathered mainly from the terms of the statute. There is no express declaration of the objects contemplated by it, but they are left to implication. Looking to the general structure of the act and the nature of its provisions, we cannot doubt that it was intended as an exercise of the right of eminent domain. It is similar to other legislative acts which authorize the taking of private property for a public use. It

[2] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 177–179.

expressly authorizes the taking and removal of the dam by a board of public officers appointed for this specific purpose; it provides the same remedy in behalf of persons injured by such taking and removal as is given in case of damages occasioned by the laying out of highways; it affords to the party aggrieved by the award of the commissioners a trial by jury, and confers on this court the power to hear and determine all questions of law arising in the proceedings, and to set aside the verdict of the jury for sufficient cause. These provisions are inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in the legislature, or in order to prohibit a use of it which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners to take down and remove the dam, or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions when the legislature intend to exercise the right to take it for a supposed public use. Thacher v. Dartmouth Bridge, 18 Pick. 501; Commonwealth v. Tewksbury, 11 Metc. 55.

Such being the manifest design of the legislature in passing the act in question, we are brought directly to a consideration of the objections urged by the plaintiffs against its validity. The first and principal one is that it violates the tenth article of the Declaration of Rights, because it authorizes the taking and appropriation of private prpoerty to a use which is not of a public nature.

In considering this objection, we are met in the outset with the suggestion, that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will or judgment of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the Constitution, that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that when it is appropriated to public uses he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature

should by statute take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, where this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. * * *

But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. * * * In many cases, there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal, or a highway, it would clearly fall within the first class; if it is transferred from one person to another or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. In the present case there can be no doubt that every owner of meadow land bordering on these rivers will be directly benefited to a greater or less extent by the reduction of the height of the plaintiffs' dam. The act is therefore in a certain sense for a private use, and enures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are therefore to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found, then we are bound to suppose that the act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property. If a use in its nature public can be subserved by the appropriation of a portion of the plaintiffs' dam in the manner provided by this act, it was clearly within the constitutional authority of the legislature to take it, and in the absence of any declared purpose, we must assume that it was taken for such legitimate and authorized use.

The geographical features of the Concord and Sudbury rivers are properly within the judicial cognizance of the court. They are stated in detail in the opinion of the court in Sudbury Meadows v. Middlesex Canal, 23 Pick. 45. From that case and an inspection of the map, it appears that these two rivers, forming parts of the same stream, pass for a distance exceeding twenty miles through a tract of country, forming their banks or borders, consisting chiefly of meadows comprising many hundreds of acres; that throughout this extent the waters are very sluggish, having only a slight fall, until they reach the plaintiffs' dam. It might well be supposed that the necessary effect of an obstruction in a stream of this nature would be to cause the waters to flow back in the bed of the rivers, to fill up their courses or channels, to overflow their sides, and to inundate to a great extent the adjacent land, which is naturally low and level, and thus to render it unfit for agricultural purposes and deprive it of its capacity to produce any profitable or useful vegetation. The improvement of so large a territory, situated in several different towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of all public utility and advantage as to make it the duty of this court to pronounce a statute, which might well be designed to effect such a purpose, invalid and unconstitutional. The act would stand on a different ground, if it appeared that only a very few individuals or a small adjacent territory were to be benefited by the taking of private property. But such is not the case here. The advantages which may result from the removal of the obstruction caused by the plaintiffs' dam are not local in their nature, nor intended to be confined to a single neighborhood. They are designed to embrace a large section of land lying in one of the most populous and highly cultivated counties in the state, and by increasing the productive capacity of the soil to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to

enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.

It is on this principle, that many of the statutes of this commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents, coeval with the origin and adoption of the Constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence. One of the earliest and most familiar instances of the exercise of such power under the Constitution is to be found in St. 1795, c. 74, for the support and regulation of mills. By this statute the owner of a mill had power, for the purpose of raising a head of water to operate his mill, to overflow the land of proprietors above and thereby to take a permanent easement in the soil of another, to the entire destruction of its beneficial use by him, on paying a suitable compensation therefor. Under the right thus conferred, the more direct benefit was to the owner of the mill only; private property was in effect taken and transferred from one individual for the benefit of another; and the only public use, which was thereby subserved, was the indirect benefit received by the community by the erection of mills for the convenience of the neighborhood, and the general advantage which accrued to trade and agriculture by increasing the facilities for traffic and the consumption of the products of the soil. Such was the purpose of this statute, as appears from the preambles to the provincial Acts of 8 and 13 Anne, from which the statute of 1795 was substantially copied. It is thereby declared that the building of mills has been "serviceable for the public good and benefit of the town or considerable neighborhood." Anc. Chart. 388, 404.

In like manner, and for similar purposes, acts of incorporation have been granted to individuals with authority to create large mill powers for manufacturing establishments, by taking private property, even to the extent of destroying other mills and water privileges on the same stream. Boston & Roxbury Mill Dam v. Newman, 12 Pick. 467, 23 Am. Dec. 622; Hazen v. Essex Co., 12 Cush. 478; Commonwealth v. Essex Co., 13 Gray, 249. The main and direct object of these acts is to confer a benefit on private stockholders who are willing to embark their skill and capital in the outlay necessary to carry forward enterprises which indirectly tend to the prosperity and welfare of the community. And it is because they thus lead incidentally to the promotion of "one of the great public industrial pursuits of the commonwealth," that they

have been heretofore sanctioned by this court, as well as by the legislature, as being a legitimate exercise of the right of eminent domain justifying the taking and appropriation of private property. Hazen v. Essex Co., 12 Cush. 475.

It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the state by allowing individuals acting primarily for their own profit to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed it would seem to be most reasonable, and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use and subjected to a servitude or easement by which its value has been impaired and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interest of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill owner to raise a dam and flow the land of adjacent proprietors has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land by taking down the dam and rendering the land available for agricultural purposes would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam on making suitable compensation to the owner. It would only be to apply to the millowner for the benefit of agriculture the same rule which had been previously applied to the landowner for the promotion of manufacturing and mechanical pursuits.

Nor are we without precedent for acts of legislation by which private property has been taken for the purpose of improving land and rendering it fertile and productive. The St. of 1795, c. 62, for the improvement of meadows, swamps, and low lands, recognizes the right of taking private property for the purpose of redeeming lands from the effects of stagnant water and of being overflowed by obstructions in brooks and rivers. * * * For the injury thus occasioned to private property, a remedy is provided by the statute. But it is clearly an appropriation of private property primarily for the benefit of the owners of the meadows or low lands

which are intended to be improved, and where the public use or benefit which justifies such appropriation consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the land.

It was suggested at the argument, that there was an essential difference between the provisions of statutes for the improvement of meadows and low lands and that under consideration, because by the former it was provided that the damages should be paid by the parties benefited, whereas by the latter they are to be paid out of the public treasury. But we cannot see the force or bearing of this suggestion. The mode of compensating the party whose property is taken cannot affect the validity of the appropriation, so far as it depends on the question, whether it was taken for a public use. If the use is not in its nature public, the appropriation is invalid and unconstitutional, and the mode by which compensation to the owners of land taken is to be made is wholly immaterial. It is only when property is taken for a purpose for which it may be constitutionally appropriated, that it becomes necessary to determine whether provision is made for compensation, suitable and adequate to furnish a remedy to the party injured. * * *

Injunction dissolved.

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## CLARK v. NASH.

(Supreme Court of United States, 1905. 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.)

[Error to the Utah Supreme Court. Nash brought a statutory condemnation proceeding to obtain a right to convey water by an enlarged ditch across Clark's land from Ft. Canyon creek to irrigate Nash's land. Nash's land was arid without irrigation, and he owned the right to use enough water from said creek to irrigate his land; but owing to the conformation of the country this water could be brought upon his land only over Clark's land, and only by enlarging a ditch already owned and used by Clark and located on Clark's land. The Utah Supreme Court upheld a judgment of condemnation of the right claimed, upon payment of $40 damages and the assumption by Nash of an obligation to bear his proportionate share of the expense of maintaining said ditch in the future.]

Mr. Justice PECKHAM. The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose.

They argue that, although the use of water in the state of Utah for the purposes of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a state statute permitting it.

In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an undividual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right to the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in this state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state which, in all probability, would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one. It is not alone the fact that the land is arid and that it will bear crops if irrigated, or that the water is necessary for the purpose of working a mine, that is material; other facts might exist which are also material,—such as the particular manner in which the irrigation is carried on or proposed, or how the mining is to be done in a particular place where water is needed for that purpose. The general situation and amount of the arid land or of the mines themselves might also be material, and what proportion of the water each owner should be entitled to; also the extent of the population living in the surrounding country, and whether each owner of land or mines could be, in fact, furnished with the necessary

water in any other way than by the condemnation in his own behalf, and not by a company, for his use and that of others.

These, and many other facts not necessary to be set forth in detail, but which can easily be imagined, might reasonably be regarded as material upon the question of public use, and whether the use by an individual could be so regarded. With all of these the local courts must be presumed to be more or less familiar. This court has stated that what is a public use may frequently and largely depend upon the facts surrounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 159, 41 L. Ed. 369, 388, 17 Sup. Ct. 56. It is true that in the Fallbrook Case the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation.

We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all

should join in the same proceeding, or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law.

The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states, arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated.

We are of opinion, having reference to the above peculiarities which exist in the state of Utah, that the statute permitting the defendant in error, upon the facts appearing in this record, to enlarge the ditch, and obtain water for his own land, was within the legislative power of the state.

Judgment affirmed.

[HARLAN and BREWER, JJ., dissented.]

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## III. Taking and Injuring Property [3]

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### EATON v. BOSTON, C. & M. R. R.

(Supreme Court of New Hampshire, 1872. 51 N. H. 504, 12 Am. Rep. 147.)

[Exceptions to rulings of court in an action on the case brought by Eaton against the Boston, Concord & Montreal Railroad. Defendant, incorporated by legislative authority, built its railroad across plaintiff's farm and beyond, paying plaintiff for all damage due to the construction and maintenance of the road on the part of his land taken therefor. Beyond plaintiff's farm was a narrow ridge of land, about 25 feet high and 20 rods wide, that protected the farm and adjacent meadows from the overflow of Baker's river. Defendant made a deep cut through this ridge for its road, and the river water flowed through this in floods and freshets upon plaintiff's farm, carrying sand and gravel upon it. For this damage plaintiff sued. The lower court ruled that defendant was liable,

[3] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 182, 183.

even though its road was carefully constructed in the usual manner, and these exceptions were taken.]

SMITH, J. It is virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land-owner above supposed. Such a distinction is attempted upon two grounds,—first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor. * * *

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tort-feasors for doing what the legislature authorized them to do. This involves two propositions: first, that the legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the legislature have power to confer such authority. There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. Tinsman v. Belvidere Delaware R. R. Co., 2 Dutcher (N. J.) 148, 69 Am. Dec. 565; Sinnickson v. Johnson, 2 Harr. (N. J.) 129, 34 Am. Dec. 184; Hooker v. New Haven & Northampton Co., 14 Conn. 146, 36 Am. Dec. 477; Fletcher v. Auburn & Syracuse R. R. Co., 25 Wend. 462; Brown v. Cayuga & Susquehanna R. R. Co., 12 N. Y. (2 Kernan) 486, 491. See, also, Eastman v. Company, 44 N. H. 143, 160, 82 Am. Dec. 201; Hooksett v. Company, 44 N. H. 105, 110; Company

v. Goodale, 46 N. H. 53, 57; Barrows, J., in Lee v. Pembroke Iron Co., 57 Me. 481, 488, 2 Am. Rep. 59. But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power. * * *

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the states) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking of the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various state Constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right * * * over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." Selden, J., in Wynehamer v. People, 13 N. Y. 378, 433; 1 Blackstone, Com. 138; 2 Austin on Jurisprudence (3d Ed.) 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," pro tanto, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence (3d Ed.) 836; Wells, J., in Walker v. O. C. W. R. R., 103 Mass. 10, 14, 4 Am. Rep. 509. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property," although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same

property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee-simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in Wynehamer v. People, 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said: "What is the land but the profits thereof?" Sutherland, J., in People v. Kerr, 37 Barb. 357, 399; Co. Litt. 4b. The private injury is thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 Am. Law Review, 197–198; Lawrence, J., in Nevins v. City of Peoria, 41 Ill. 502, 511, 89 Am. Dec. 392. The explicit language used in one clause of our Constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken.

* * *" Constitution of N. H., Bill of Rights, article 12. The opposite construction would practically nullify the Constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge. but it is what Sir William Erle calls "consequential damage to the actionable degree." See Brand v. H. & C. R. Co., Law Reports, 2 Queen's Bench, 223, 249. These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." Brinkerhoff, J., in Reeves v. Treasurer of Wood County, 8 Ohio St. 333, 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on to the plaintiff's land, it has that result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood-waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end

of the cut on to the plaintiff's land, the answer is, that the water did not come naturally to the southerly end of the cut. It came there by reason of the defendants' having made that cut. In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" See Bramwell, Baron, in Smith v. Fletcher, Law Reports, 7 Exchq. 305, 310. If the ridge still remained in its natural condition, could the defendants pump up the flood-water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water by the force of gravitation will inevitably find its way to the plaintiff's land? See Ames, J., in Shipley v. Fifty Associates, 106 Mass. 194, 199, 200, 8 Am. Rep. 318; Chapman, C. J., in Salisbury v. Herchenroder, 106 Mass. 458, 460, 8 Am. Rep. 354. To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." See Lawrence, J., in Nevins v. City of Peoria, 41 Ill. 502, 510, 89 Am. Dec. 392; Dixon, C. J., in Pettigrew v. Village of Evansville, 25 Wis. 223, 231, 236, 3 Am. Rep. 50. The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood-water on to the land of the plaintiff. Indeed, the passage of this water through the cut may cause some injury to the defendants' road bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff.

In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent—that is, usable or used only at times." See Goddard's Law of Easements, 125. If the defendants had erected a dam on their own

land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see Leconfield v. Lonsdale, Law Reports, 5 Com. Pleas, 657, 696); and the weight of that burden is not necessarily dependent upon the source of the water, whether from below or above. See Bell, J., in Tillotson v. Smith, 32 N. H. 90, 95, 96, 64 Am. Dec. 355. In both instances they turn water upon the plaintiff's land "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See Brinkerhoff, J., ubi supra; Selden, J., in Williams v. N. Y. Central R. R., 16 N. Y. 97, 109, 69 Am. Dec. 651. An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. Blake v. Rich, 34 N. H. 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See Redfield, J., in Hatch v. Vt. Central R. R., 25 Vt. 49, 66. What difference does it make in principle whether the plaintiff's land is encumbered with stones, or with iron rails? whether the defendants run a locomotive over it, or flood it with the waters of Baker's river? See Wilcox, J., in March v. P. & C. R. R., 19 N. H. 372, 380; Walworth, Chan., in Canal Com'rs & Canal Appraisers v. People, 5 Wend. 423, 452. * * *

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the ruling of the court was correct. These conclusions, which are supported by authorities to which reference will soon be made, seem to us so clear, that, if there were no adverse authorities, it would be unnecessary to prolong the discussion of this case. But, as there are respectable authorities which are in direct conflict with these conclusions, it has been thought desirable to examine some arguments which have, at various times, been advanced in support of the opposite view.

In some instances, as soon as it has been made to appear that there is a legislative enactment purporting to authorize the doing of the act complained of, the complaint has been at once summarily disposed of by the curt statement "that an act authorized by law cannot be a tort." This is begging the question. It assumes the constitutionality of the statute. If the enactment is opposed to the Constitution, it is "in fact no law at all." * * * The error in question * * * arises from following English authorities, without adverting to the immense difference between the practically omnipotent powers of the British Parliament and the comparatively limited powers of our state legislatures, acting under the restrictions of written constitutions. Parliament is the supreme power of the realm. It is at once a legislature and a constitutional convention. * * *

It is said that a land-owner is not entitled to compensation where the damage is merely "consequential." The use of this term "consequential damage" "prolongs the dispute," and "introduces an equivocation which is fatal to any hope of a clear settlement." It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what Erle, C. J., aptly terms "consequential damage to the actionable degree." Brand v. H. & C. R. Co., Law Reports, 2 Queen's Bench, 223, 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. * * * When, then, it is said that a land-owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would not have been actionable at common law if done

by a private individual, the proposition is correct. The constitutional restriction was designed "not to give new rights, but to protect those already existing." Pierce on Am. R. R. Law, 173; and see Rickett v. Directors, &c., of Metropolitan Railway Co., Law Reports, 2 House of Lords, 175, 188, 189, 196. But this does not concern the present case, where it is virtually conceded that the injury would have been actionable if done by a private individual not acting under statutory authority. If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitrary rule that such damage can in no event amount to a "taking of property."

The severity of the injury ultimately resulting from an act is not always in inverse proportion to the lapse of time between the doing of the act and the production of the result. Heavy damages are recovered in case as well as in trespass. The question whether the injury constitutes a "taking of property" must depend on its effect upon proprietary rights, not on the length of time necessary to produce that effect. If a man's entire farm is permanently submerged, is the damage to him any less because the submerging was only the "consequential" result of another's act? It has been said "that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseisin;" but if it be conceded that at present the only common law remedy is by an action on the case, that does not change the aspect of the constitutional question. The form of action in which the remedy must be sought cannot be decisive of the question whether the injury falls within the constitutional prohibition. "We are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and encumbered." Such a test would be inapplicable in a large proportion of the states, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action. * * *

[After a lengthy review of the authorities:] By the foregoing review of authorities, it appears that the number of actual decisions in irreconcilable conflict with the present opinion is much smaller than has sometimes been supposed, and that, in a large proportion of the cases cited, the application of the principles here maintained would not have necessitated the rendition of a different judgment from that which the courts actually rendered in those cases. * * *

Case discharged.

## SAWYER v. DAVIS.

(Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 239, 49 Am. Rep. 27.)

[Case reserved. The plaintiff manufacturers had been enjoined by the present defendants from ringing their mill bell before 6:30 a. m. as a nuisance. See Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519. Acting under subsequent legislative authority the selectmen of Plymouth granted to plaintiffs a license to ring their bell at 5 a. m. as they had done before the injunction. Plaintiffs then filed a bill of review to have the former injunction dissolved or modified in accordance with said license. On demurrer to the bill, Colburn, J., reserved the case for the full court.]

C. ALLEN, J. Nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. Bancroft v. Cambridge, 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable disturbance in the enjoyment of his property. Merrifield v. Worcester, 110 Mass. 216, 219, 14 Am. Rep. 592. In this conflict of rights, police regulations by the Legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the Legislature, with a view to the safety of life, provides that bells shall be rung and

whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. Bancroft v. Cambridge, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. [Citing cases.] * * *

The recent case of Baltimore & Potomac Railroad v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works, to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their

property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and necessarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point.

In this commonwealth, as well as in several of the United States and in England, the cases already cited show that the question is settled by authority, and we remain satisfied with the reasons upon which the doctrine was here established. Courts are compelled to recognize the distinction between such serious disturbances as existed in the case referred to, and comparatively slight ones, which differ in degree only, and not in kind, from those suffered by others in the same vicinity. Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the Legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in Commonwealth v. Alger, 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the Legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. * * *

[The court then decided that defendants had no vested right to a continuance of the injunction after the law had been changed by the Legislature.]

Demurrer overruled.

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## SAUER v. CITY OF NEW YORK

(Supreme Court of United States, 1907. 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.)

[Error to the New York Supreme Court, upon a judgment for defendant, affirmed by the Appellate Division and the Court of Appeals, and then remitted to the Supreme Court of the state for final judgment. The plaintiff owned land and buildings upon 155th street in New York City, one end of which street was closed by a steep bluff 70 feet high. To connect this street with the streets at the top of the bluff, the city constructed a viaduct above the surface of 155th street, running with a gradual ascent to the top of the bluff, and devoted solely to ordinary street traffic by teams, vehicles, and pedestrians. Opposite plaintiff's land the viaduct was 50 feet high, 63 feet wide, and came within 10 feet of his building. The viaduct and its supporting columns materially impaired the light, air, and access plaintiff's land enjoyed from the street. Other facts appear in the opinion.]

Mr. Justice MOODY. * * * The plaintiff, in his complaint, alleged that this structure was unlawful, because the law under which it was constructed did not provide for compensation for the injury to his private property in the easements of access, light, and air, appurtenant to his estate. The court of appeals denied the plaintiff the relief which he sought, upon the ground that, under the law of New York, he had no easements of access, light, or air, as against any improvement of the street for the purpose of adapting it to public travel. In other words, the court in effect decided that the property alleged to have been injured did not exist. The reasons upon which the decision of that court proceeded will appear by quotations from the opinion of the court, delivered by Judge Haight. Judge Haight said:

"The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of

public travel, especially in cities where the growth of population increases the use of the highways. The rule may be different as to peculiar and extraordinary changes made for some ulterior purposes other than the improvement of the street, as, for instance, where the natural surface has been changed by artificial means, such as the construction of a railroad embankment, or a bridge over a railroad, making elevated approaches necessary. But as to changes from the natural contour of the surface, rendered necessary in order to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets." * * *

The plaintiff now contends that the judgment afterwards rendered by the supreme court of New York, in conformity with the opinion of the court of appeals, denied rights secured to him by the federal Constitution. This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question. But it may not be inappropriate to say that the decision of the court of appeals seems to be in full accord with the decisions of all other courts in which the same question has arisen. The state courts have uniformly held that the erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation corporation, is a legitimate street improvement, equivalent to a change of grade; and that, as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it. Selden v. Jacksonville, 28 Fla. 558, 14 L. R. A. 370, 29 Am. St. Rep. 278, 10 South. 457; Willis v. Winona City, 59 Minn. 27, 26 L. R. A. 142, 60 N. W. 814; Colclough v. Milwaukee, 92 Wis. 182, 65 N. W. 1039; Walish v. Milwaukee, 95 Wis. 16, 69 N. W. 818; Home Bldg. & Conveyance Co. v. Roanoke, 91 Va. 52, 27 L. R. A. 551, 20 S. E. 895 (cited with apparent approval by this court in Meyer v. Richmond, 172 U. S. 82–95, 43 L. Ed. 374–379, 19 Sup. Ct. 106); Willets Mfg. Co. v. Mercer County, 62 N. J. Law, 95, 40 Atl. 782; Brand v. Multnomah County, 38 Or. 79, 50 L. R. A. 389, 84 Am. St. Rep. 772, 60 Pac. 290, 62 Pac. 209; Mead v. Portland, 45 Or. 1, 76 Pac. 347 (affirmed by this court in 200 U. S. 148, 50 L. Ed. 413, 26 Sup. Ct. 171); Sears v. Crocker, 184 Mass. 588, 100 Am. St. Rep. 577, 69 N. E. 327; (semble) De Lucca v. North Little Rock (C. C.) 142 Fed. 597.

The case of Willis v. Winona is singularly like the case at bar in its essential facts. There, as here, a viaduct was constructed,

connecting by a gradual ascent the level of a public street with the level of a public bridge across the Mississippi. An owner of land abutting on the street over which the viaduct was elevated was denied compensation for his injuries, Mr. Justice Mitchell saying:

"The bridge is just as much a public highway as is Main street, with which it connects; and, whether we consider the approach as a part of the former or of the latter, it is merely a part of the highway. The city having, as it was authorized to do, established a new highway across the Mississippi river, it was necessary to connect it, for purposes of travel, with Main and the other streets of the city. This it has done, in the only way it could have been done, by what, in effect, amounts merely to raising the grade of the center of Main street in front of plaintiff's lot. It can make no difference in principle whether this was done by filling up the street solidly, or, as in this case, by supporting the way on stone or iron columns. Neither is it important if the city raise the grade of only a part of the street, leaving the remainder at a lower grade. * * *

"The doctrine of the courts everywhere, both in England and in this country (unless Ohio and Kentucky are exceptions), is that so long as there is no application of the street to purposes other than those of a highway, any establishment or change of grade made lawfully, and not negligently performed, does not impose an additional servitude upon the street, and hence is not within the constitutional inhibition against taking private property without compensation, and is not the basis for an action for damages, unless there be an express statute to that effect. That this is the rule, and that the facts of this case fall within it, is too well established by the decisions of this court to require the citation of authorities from other jurisdictions. * * *

"The New York elevated railway cases cited by plaintiff are not authority in his favor, for they recognize and affirm the very doctrine that we have laid down (Story v. New York Elev. R. Co., 90 N. Y. 122, 43 Am. Rep. 146), but hold that the construction and maintenance on the street of an elevated railroad operated by steam, and which was not open to the public for purposes of travel and traffic, was a perversion of the street from street uses, and imposed upon it an additional servitude, which entitled abutting owners to damages." * * *

Has the plaintiff been deprived of his property without due process of law? The viaduct did not invade the plaintiff's land. It was entirely outside that land. But it is said that appurtenant to the land there were easements of access, light, and air, and that the construction and operation of the viaduct impaired these easements to such an extent as to constitute a taking of them. The

only question which need here be decided is whether the plaintiff had, as appurtenant to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light, and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets, or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies, and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the fourteenth amendment is shown.

The remaining question in the case is whether the judgment under review impaired the obligation of a contract. It appears from the cases to be cited that the courts of New York have expressed the rights of owners of land abutting upon public streets to and over those streets in terms of contract rather than in terms of title. In the city of New York the city owns the fee of the public streets (whether laid out under the civil law of the Dutch régime, or as the result of conveyances between the city and the owners of land, or by condemnation proceedings under the statutory law of the state) upon a trust that they shall forever be kept open as public streets, which is regarded as a covenant running with the abutting land. Accepting, for the purposes of this discussion, the

view that the plaintiff's rights have their origin in a contract, then it must be that the terms of the trust and the extent of the resulting covenant are for the courts of New York finally to decide and limit, providing that in doing so they deny no federal right of the owner. The plaintiff asserts that the case of Story v. New York Elev. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, decided in 1882, four years before he acquired title to the property, interpreted the contract between the city of New York and the owners of land abutting upon its streets as assuring the owner easements of access, light, and air, which could not lawfully be impaired by the erection on the street of an elevated structure designed for public travel; that he is entitled to the benefit of his contract as thus interpreted, and that the judgment of the court denying him its benefits impaired its obligation. If the facts upon which this claim is based are accurately stated, then the case comes within the authority of Muhlker v. New York & H. R. Co., 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. 522, which holds that, when the court of appeals has once interpreted the contract existing between the landowner and the city, that interpretation becomes a part of the contract, upon which one acquiring land may rely, and that any subsequent change of it to his injury impairs the obligation of the contract. * * *

The plaintiff in the Story Case held the title to land injuriously affected by the construction of an elevated railroad, as a successor to a grantee from the city. In the deed of the city the land was bounded on the street and contained a covenant that it should "forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are, or lawfully ought to be." It was held that by virtue of this covenant, which ran with the land, the plaintiff was entitled to easements in the street of access, and of free and uninterrupted passage of light and air; that the easements were property within the meaning of the Constitution of the state, and could not lawfully be taken from their owner without compensation, and that the erection of the elevated structure was a taking. The decision rested upon the view that the erection of an elevated structure for railroad purposes was not a legitimate street use. "There is no change," said Judge Danforth (page 156), "in the street surface intended; but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street (Corning v. Lowerre, 6 Johns. Ch. 439) or the freight depot (Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224)."

"The question here presented," said Judge Tracy (p. 174, Am. Rep. p. 156), "is not whether the legislature has the power to regu-

late and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city." [Here follow quotations to the same effect from Lahr v. Elev. R. Co., 104 N. Y. 268, 10 N. E. 528, and Kane v. Elev. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640, holding that even apart from express covenant, New York City owned the fee of all streets upon a statutory trust that they should be kept open as public streets.] * * *

It would be difficult for words to show more clearly than those quoted from the opinions that such a case as that now before us was not within the scope of the decisions or of the reasons upon which they were founded. The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light, and air, was an important element in the decisions, but it was not the only essential element. The structures in these cases were held to violate the landowners' rights, not only because they were elevated and thereby obstructed access, light, and air, but also because they were designed for the exclusive and permanent use of private corporations. The limitation of the scope of the decision to such structures, erected for such purposes, appears not only in the decisions themselves, but quite clearly from subsequent decisions of the court of appeals. In the case of Fobes v. Rome, W. & O. R. Co., 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919, Judge Peckham, now Mr. Justice Peckham, made the following statement of the effect of the Story Case. Certain portions of it are italicized here for the purpose of emphasizing the point now under consideration:

"It was not intended in the Story Case to overrule or change the law in regard to steam surface railroads. The case embodied the application of what was regarded as well-established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a *total and exclusive use of* such portion *by the defendant,* and such *permanent obstruction and total and exclusive use,* it was further held, amounted to a taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air, and access to his adjoining lot. This *absolute* and *permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of defendant;* which structure is fully described in the case as reported.

"The structure, by the mere fact of its existence in the street, per-

manently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and, in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. *Such a permanent, total, exclusive, and absolute appropriation of a portion of the street as this structure amounted to* was held to be illegal and wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the *permanent and exclusive nature of the appropriation by the defendant of the public street, or of some portion thereof.*"

The distinction between the erection of an elevated structure for the exclusive use of a private corporation and the same structure for the use of public travel is clearly illustrated in the contrast in the decisions of Reining v. New York, L. & W. R. Co., 128 N. Y. 157, 14 L. R. A. 133, 28 N. E. 640, and Talbot v. New York & H. R. Co., 151 N. Y. 155, 45 N. E. 382. In the first case it was held that the abutting landowner had the right to compensation for the construction of a viaduct in the street for the practically exclusive occupation of a railroad. In the second case it was held that the abutting owner had no right of compensation for the erection of a public bridge with inclined approaches and a guard wall, to carry travel over a railroad, although the structure impaired the access to his land. * * *

The trust upon which streets are held is that they shall be devoted to the uses of public travel. When they, or a substantial part of them, are turned over to the exclusive use of a single person or corporation, we see no reason why a state court may not hold that it is a perversion of their legitimate uses, a violation of the trust, and the imposition of a new servitude. But the same court may consistently hold that with the acquisition of the fee, and in accordance with the trust, the city obtained the right to use the surface, the soil below, and the space above the surface, in any manner which is plainly designed to promote the ease, facility, and safety of all those who may desire to travel upon the streets; and that the rights attached to the adjoining land, or held by contract by its owner, are subordinate to such uses, whether they were foreseen or not when the street was laid out. In earlier and simpler times the surface of the streets was enough to accommodate all travel. But under the more complex conditions of modern urban life, with its high and populous buildings, and its rapid interurban transportation, the requirements of public travel are largely in-

creased. Sometimes the increased demands may be met by subways and sometimes by viaducts. The construction of either solely for public travel may well be held by a state court to be a reasonable adaptation of the streets to the uses for which they were primarily designed. What we might hold on these questions where we had full jurisdiction of the subject, it is not necessary here even to consider.

In basing its judgment on the broad, plain, and approved distinction between the abandonment of the street to private uses and its further devotion to public uses, the court below overruled none of its decisions, but, on the contrary, acted upon the principles which they clearly declared. The plaintiff, therefore, has not shown that in his case the state court has changed, to his injury, the interpretation of his contract with the city, which it had previously made, and upon which he had the right to rely. * * *

Judgment affirmed.

[McKenna, J., gave a dissenting opinion, in which Day, J., concurred.]

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## RIGNEY v. CHICAGO.

(Supreme Court of Illinois, 1882. 102 Ill. 64.)

[Appeal from a decision of the Appellate Court of the First District, affirming a decision of the circuit court of Cook county. Plaintiff owned residential premises on Kinzie street in Chicago, 220 feet east of Halsted street. Defendant city in 1874 constructed a viaduct for general street purposes along Halsted street and across Kinzie street, which cut off traffic between these two streets at their intersection, except by a flight of stairs. Halsted street was one of the main thoroughfares of Chicago, and this obstruction reduced the value of plaintiff's property from $5,000 to about $1,700. The defendant owned the streets in fee. Plaintiff sued, under the state Constitution of 1870, for the damage thus caused. The trial court directed a verdict for the defendant, and the Appellate Court affirmed this. The constitutional provision in question appears in the opinion.]

Mr. Justice Mulkey. * * * Previous to, and at the time of the adoption of the present Constitution, it was the settled doctrine of this court that any actual physical injury to private property, by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the Constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained.

This construction, making an actual physical invasion of the property affected the test in every case, excluded from the benefits of the Constitution many cases of great hardship, for, as in the present case, it often happened that while there was no actual physical injury to the property, yet the approaches to it were so cut off and destroyed as to leave it almost valueless. Under this condition of affairs the framers of the present Constitution, doubtless with a view of giving greater security to private rights by affording relief in such cases of hardship where it had before been denied, declared therein that "private property shall not be taken or damaged for public use without just compensation." The addition of the words "or damaged" can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the state. * * *

It is conceded that some little confusion exists with respect to the use of the expression, "physical injury," in connection with the term property; but it is believed this arises mainly from the ambiguous character of the latter term, and doubtless all the apparent[ly] conflicting expressions to be found in the opinions of this court upon this subject may be harmonized, upon the theory that the term property, in that connection, is used in different senses. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the Constitution; yet the term is often used to indicate the res or subject of the property, rather than the property itself, and it is evidently used in this sense in some of the cases in connection with the expression physical injury, while at other times it is probably used in its more appropriate sense, as above mentioned. The meaning, therefore, of the expression "physical injury," when used in connection with the term "property," would in any case necessarily depend upon whether the term property was used in the one sense or the other. To illustrate: If the lot and buildings of appellant are to be regarded as property, and not merely the subject of property, as strictly speaking they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant's property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical. * * *

Under the Constitution of 1848 it was essential to a right of recovery, as we have already seen, that there should be a direct physical injury to the corpus or subject of the property, such as

overflowing it, casting sparks or cinders upon it, and the like; but under the present Constitution it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action. * * *

The question then recurs, What additional class of cases did the framers of the new Constitution intend to provide for which are not embraced in the old? While it is clear that the present Constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of damnum absque injuria. So as to an obstruction in a public street,—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.

The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present Constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. Chamberland v. West End of London Railway Co., 2 Best & Smith, 605; Beckitt v. Midland Railway Co., L. R. 1 C. P. 241, on appeal 3 C. P. 82; McCarthy v. Metropolitan Board of Works, L. R. 7 C. P. 508. These statutes required compensation to be made where property was "injuriously affected," which the English courts construe as synonymous with the word "damaged." Hall v. Mayor

of Bristol, L. R. 2 C. P. 322; East and West India Docks Co. v. Gattke, 3 McN. & G. 155.

The rule we have adopted was unanimously sustained by the House of Lords in the McCarthy Case, supra, and is believed to be in consonance with reason, justice, and sound legal principles, and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court. * * *

Judgment reversed.

[DICKEY, C. J., gave a concurring opinion. SCOTT, CRAIG, and SHELDON, JJ., dissented.]

# CONSTITUTIONAL PROTECTION OF CIVIL RIGHTS

## I. Liberty [1]

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### ALLGEYER v. LOUISIANA.

(Supreme Court of United States, 1897. 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.)

[Error to the Supreme Court of Louisiana. A Louisiana statute forbade, under penalty of a fine of $1,000 for each offence, any person, firm, or corporation from doing any act in that state to effect, for himself or for another, insurance on property in the state, in any marine insurance company which had not complied with the laws of the state. E. Allgeyer & Co. made a contract in New York, with a New York insurance company not doing business in Louisiana, for an open policy of marine insurance for $200,000 upon future shipments of cotton. By the terms of the policy Allgeyer was to notify the company from time to time of shipments applicable to the policy, and the sending of such notices was a condition precedent to the attaching of the risk. A separate policy was issued in New York for each risk, the premium to be there paid in cash by Allgeyer. Allgeyer & Co. sent a notice of a shipment, under this contract, and remitted the premium from New Orleans to New York. The state court held them liable to the statutory penalty therefor, and this writ of error was taken.]

Mr. Justice PECKHAM. * * * In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the state of Louisiana, being made and to be performed within the state of New York, where the premiums were to be paid, and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the state of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the state. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent.

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 199, 206.

It is natural that the state court should have remarked that there is in this "statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired." Such interference is not only apparent, but it is real, and we do not think that it is justified for the purpose of upholding what the state says is its policy with regard to foreign insurance companies which had not complied with the laws of the state for doing business within its limits. In this case the company did no business within the state, and the contracts were not therein made.

The supreme court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

It was said by Mr. Justice Bradley, in Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, at page 762, 4 Sup. Ct. 652, at page 657, 28 L. Ed. 585, in the course of his concurring opinion in that case, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Again, on page 764 of 111 U. S., and on page 658 of 4 Sup. Ct. (28 L. Ed. 585), the learned justice said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." And again, on page 765 of 111 U. S. and on page 658 of 4 Sup.

Ct. (28 L. Ed. 585): "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word "liberty," as contained in the fourteenth amendment.

Again, in Powell v. Pennsylvania, 127 U. S. 678, 684, 8 Sup. Ct. 992, 995, 1257, 32 L. Ed. 253, Mr. Justice Harlan, in stating the opinion of the court, said: "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law." It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error.

The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word "liberty" as used in the amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises. * * *

In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto; and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while

he himself remains within it. Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; Tilden v. Blair, 21 Wall. 241, 22 L. Ed. 632. The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract, upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state. * * *

Judgment reversed.[2]

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## BAILEY v. ALABAMA.

(Supreme Court of United States, 1911. 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.)

[Error to the Supreme Court of Alabama, which had affirmed the conviction of Bailey in the Montgomery city court for violation of section 4730, Code of Alabama. The facts appear in the opinion.]

Mr. Justice HUGHES. * * * The statute in question is section 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907 (Laws 1907, p. 636), * * * [which] reads as follows:[3] * * *

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if

[2] "The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire, possess, and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the state."—Andrews, J., in Bertholf v. O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323 (1878).

[3] "Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one half of said fine to go to the county and one half to the party injured; * * * and the refusal or failure of any person, who enters into such contract, to perform such act or service, * * * or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or defraud him."

read into the statute itself, that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify "as to his uncommunicated motives, purpose, or intention." Bailey v. State, 161 Ala. 77, 78, 49 South. 886. * * *

We at once dismiss from consideration the fact that the plaintiff in error is a black man. * * * The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. * * *

Prima facie evidence is sufficient evidence to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict of guilty. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." Kelly v. Jackson, 6 Pet. 632, 8 L. Ed. 526. * * *

It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this light that the validity of the statute must be determined. * * *

While, in considering the natural operation and effect of the statute, as amended, we are not limited to the particular facts of the case at the bar, they present an illuminating illustration. We may briefly restate them. Bailey made a contract to work for a year at $12 a month. He received $15, and he was to work this out, being entitled monthly only to $10.75 of his wages. No one was present when he made the contract but himself and the manager of the employing company. There is not a particle of evidence of any circumstance indicating that he made the contract or received the money with any intent to injure or defraud his employer. On the contrary, he actually worked for upwards of a month. His motive in leaving does not appear, the only showing being that it was without legal excuse and that he did not repay the money received. For this he is sentenced to a fine of $30 and to imprisonment at hard labor, in default of the payment of the fine and costs, for 136 days. Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Consider the situation of the accused under this statutory presumption. If, at the outset, nothing took place but the making of

the contract and the receipt of the money, he could show nothing else. If there was no legal justification for his leaving his employment, he could show none. If he had not paid the debt, there was nothing to be said as to that. The law of the state did not permit him to testify that he did not intend to injure or defraud. Unless he were fortunate enough to be able to command evidence of circumstances affirmatively showing good faith, he was helpless. He stood, stripped by the statute of the presumption of innocence, and exposed to conviction for fraud upon evidence only of breach of contract and failure to pay. * * *

[After referring to Toney v. State, 141 Ala. 120, 37 South. 332, 67 L. R. A. 286, 109 Am. St. Rep. 23, 3 Ann. Cas. 319:] We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Fong Yue Ting v. United States, 149 U. S. 698, 749, 13 Sup. Ct. 1016, 37 L. Ed. 905, 925. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. * * *

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law, or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its

authority by the federal Constitution, or subject an accused to conviction for conduct which it is powerless to prescribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the thirteenth amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

The thirteenth amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Pursuant to the authority thus conferred, Congress passed the act of March 2, 1867 [14 Stat. 546, c. 187), the provisions of which are now found in sections 1990 and 5526 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1266, 3715), as follows:[4] * * *

The act of March 2, 1867 (Rev. Stat. §§ 1990 and 5526, supra), was a valid exercise of this express authority. Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. * * *

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. This has been so clearly stated by this court in the Case of Clyatt, supra, that discussion is unnecessary. The court there said: "The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What

[4] "Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. * * * Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor (Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715), or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt." 197 U. S. 215, 216, 25 Sup. Ct. 430, 49 L. Ed. 726.

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The thirteenth amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorized the employing company to seize the debtor, and hold him to the service until he paid the $15, or had furnished the equivalent in labor, its invalidity would

not be questioned. It would be equally clear that the state could not authorize its constabulary to prevent the servant from escaping, and to force him to work out his debt. But the state could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. "In contemplation of the law, the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." Ex parte Hollman, 79 S. C. 22, 60 S. E. 24, 21 L. R. A. (N. S.) 249, 14 Ann. Cas. 1109.

What the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. * * * There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. * * * The act of Congress deprives of effect all legislative measures of any state through which, directly or indircetly, the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established or maintained; and we conclude that section 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, prima facie evidence of the commission of the crime which the section defines, is in conflict with the thirteenth amendment, and the legislation authorized by that amendment, and is therefor invalid. * * *

Judgment reversed.

[HOLMES, J., gave a dissenting opinion, in which LURTON, J., concurred, on the ground that the thirteenth amendment did not forbid a state to make breach of contract a crime with the usual penal consequences. "Compulsory work for no private master in a jail is not peonage" (219 U. S. 247, 31 Sup. Ct. 153, 55 L. Ed. 191).]

## II. Equal Protection of the Laws [5]

### Ex parte VIRGINIA.

(Supreme Court of United States, 1880. 100 U. S. 339, 25 L. Ed. 676.)

[Petition for a writ of habeas corpus. One Coles, a county court judge of Virginia, was indicted in the federal District Court of that state and arrested, charged with violating the statute quoted in the opinion below, in that he excluded colored persons from the jury lists made out by him, on account of their race, color, and previous condition of servitude. The state statute under which he acted made no discrimination against the colored race, but required him to prepare a jury list of inhabitants of the county that in his opinion were "well qualified to serve as jurors," "of sound judgment and free from legal exception." He and the state of Virginia both sought his discharge by habeas corpus.]

Mr. Justice STRONG. * * * [After holding the petition to be within the appellate jurisdiction of the court:]

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification,—if any they have,—in the Act of Congress of March 1, 1875, sect. 4. 18 Stat., part 3, 336. That section enacts that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000." The defendant has been indicted for the misdemeanor described in this act, and it is not denied that he is now properly held in custody to answer the indictment, if the Act of Congress was warranted by the Constitution. The whole merits of the case are involved in the question, whether the act was thus warranted. [The provisions of the Constitution that relate to this subject are found in the thirteenth and fourteenth amendments.] * * *

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the states. They were intended to take away all possibility of oppression by

[5] For discussion of principles, see Black, Const. Law (3d Ed.) § 209.

law because of race or color. They were intended to be, what they really are, limitations of the power of the states and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. * * * This protection and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

All of the amendments derive much of their force from this latter provision. It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a state in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power. * * *

We have said the prohibitions of the fourteenth amendment are addressed to the states. They are, "No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it. * * * [Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717, is here distinguished, on the ground that the fourteenth amendment, § 5, expressly authorizes congressional enforcement.]

We do not perceive how holding an office under a state, and claiming to act for the state, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a state judge for his official acts; and it was assumed that Judge Coles, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the Act of Congress is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing. * * *

Petition denied.

[FIELD, J., gave a dissenting opinion, in which CLIFFORD, J., concurred, upon the ground, among others, that the act of selecting state jurors was an act of judicial discretion and not subject to federal control.]

## CIVIL RIGHTS CASES.

(Supreme Court of United States, 1883. 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835.)

[Writs of error to federal Circuit Courts and certificates of division of opinion among the judges below in a number of cases involving the constitutionality of the act of Congress known as the Civil Rights Act. Various colored persons had been denied by the proprietors of hotels, theaters, and railway companies the full enjoyment of the accommodations thereof, for reasons other than those excepted by said statute, and those proprietors had been indicted or sued for the penalty prescribed by the act. The act provided (see note below).[6]]

Mr. Justice BRADLEY. * * * Are these sections constitutional? The first section, which is the principal one, cannot be fairly understood without attending to the last clause, which qualifies the preceding part. The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. In other words, it is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, no distinction shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. Its effect is to declare that in all inns, public conveyances, and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement, as are enjoyed by white citizens; and vice versa. The second section makes it a penal offense in any person to deny to any citizen of any race or color, regardless of previous servitude, any of the accommodations or privileges mentioned in the first section.

Has congress constitutional power to make such a law? Of

[6] "Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the" aforesaid accommodations, etc., shall for each offence forfeit the sum of $500 to the person aggrieved and be guilty of a misdemeanor, these remedies being enforceable in the alternative.

course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the fourteenth amendment, and the views and arguments of distinguished senators, advanced while the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. We have carefully considered those arguments, as was due to the eminent ability of those who put them forward, and have felt, in all its force, the weight of authority which always invests a law that congress deems itself competent to pass. But the responsibility of an independent judgment is now thrown upon this court; and we are bound to exercise it according to the best lights we have.

The first section of the fourteenth amendment,—which is the one relied on,—after declaring who shall be citizens of the United States, and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state law and state acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they

are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667, and Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give to congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised. The remedy which congress actually provided was that contained in the twenty-fifth section of the judiciary act of 1789 [1 Stat. 85], giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of state courts whenever they should sustain the validity of a state statute or authority, alleged to be repugnant to the Constitution or laws of the United States. By this means, if a state law was passed impairing the obligation of a contract, and the state tribunals sustained the validity of the law, the mischief could be corrected in this court. The legislation of congress, and the proceedings provided for under it, were corrective in their character. No attempt was made to draw into the United States courts the litigation of contracts generally, and no such attempt would have been sustained. We do not say that the remedy provided was the only one that might have been provided in that case. Probably congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and, under the broad provisions of the act of March 3, 1875 [18 Stat. 470, c. 137], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists. But under that or any other law, it must appear, as well by allegation as proof at the trial, that the Constitution had been violated by the action of the state legislature. Some obnoxious state law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the

case, and for the very sufficient reason that the constitutional prohibition is against *state laws* impairing the obligation of contracts.

And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises, but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make congress take the place of the state legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore congress may establish laws for their equal protection. In fine, the legislation which congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which by the amendment they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the fourteenth amendment on the part of the states. It is not predicated on any such view. It proceeds ex directo to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the states; it does not make its operation

to depend upon any such wrong committed. It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the states may deprive persons of life, liberty, and property without due process of law, (and the amendment itself does suppose this,) why should not congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theaters. The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon congress to enforce the prohibition, this gives congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676, it was held that an indictment against a state officer under this section for excluding persons of color from the jury list is sustainable. But

a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the state government, carry into effect such a rule of disqualification. In the Virginia case, the state, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute-book of the state actually laid down any such rule of disqualification or not, the state, through its officer, enforced such a rule; and it is against such state action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering. * * *

[After distinguishing the so-called "Civil Rights Bill" of 1866 and 1868 (14 Stat. 27; 16 Stat. 140), which made guilty of a misdemeanor any person who, under color of any law, statute, ordinance, regulation or custom, subjected any inhabitant of a state or territory to the deprivation of any of certain enumerated important civil rights:] The civil rights bill here referred to is analogous in its character to what a law would have been under the original Constitution, declaring that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it under color or pretense that it had been rendered void or invalid by a state law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defense.

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may com-

mit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the state where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizens against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post-offices and post-roads, the declaring of war, etc. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be,—and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of U. S. v. Harris [106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290],—it is clear that the law in question cannot be sustained by any grant of legislative power made to congress by the fourteenth amendment. That amendment prohibits the states from denying to any person the equal protection of the laws, and declares that congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse state legislation on the subject,

declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation. Whether it would not have been a more effective protection of the rights of citizens to have clothed congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon congress by the fourteenth amendment, and, in our judgment, it has not. * * * [Portions of the opinion below this point, dealing with the thirteenth amendment, are omitted.]

We must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery: the latter prohibited the states from abridging the privileges or immunities of citizens of the United States, from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of congress under them are different. What congress has power to do under one, it may not have power to do under the other. Under the thirteenth amendment, it has only to do with slavery and its incidents. Under the fourteenth amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States; or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the thirteenth amendment the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings. * * *

Innkeepers and public carriers, by the laws of all the states, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the

fourteenth amendment, congress has full power to afford a remedy under that amendment and in accordance with it.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. * * *

On the whole, we are of opinion that no countenance of authority for the passage of the law in question can be found in either the thirteenth or fourteenth amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several states is concerned.

Judgment accordingly.

[HARLAN, J., gave a dissenting opinion.]

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BARBIER v. CONNOLLY (1885) 113 U. S. 27, 30–32, 5 Sup. Ct. 357, 28 L. Ed. 923, Mr. Justice FIELD (upholding an ordinance of San Francisco, the contested part of which appears in the quotation below):

"That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from state legislation or state tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The

specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same cir-

cumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

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## GULF, C. & S. F. RY. CO. v. ELLIS.

(Supreme Court of United States, 1897. 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.)

[Error to the Supreme Court of Texas. A Texas statute provided that when any person, having a valid claim not exceeding $50 against a railway corporation for personal service or labor, or for damages or overcharges on freight, or for injuries to stock by trains, should present such claim to the company under oath, and such claim should remain unpaid more than 30 days thereafter, the claimant might sue; and if he finally obtained judgment for the full amount of said claim he should be entitled in addition to an attorney fee of not over $10. Ellis, after complying with this statute, obtained judgment against the defendant company for $50 for a colt killed by it, and for a $10 attorney fee. The judgment for the attorney fee was appealed by defendant through two intermediate appellate courts to the state Supreme Court and was there affirmed.]

Mr. Justice BREWER. The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases. * * *

While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action. * * *

But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is

equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.

As well said by Black, J., in State v. Loomis, 115 Mo. 307, 314, 22 S. W. 350, 351, 21 L. R. A. 789, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon statute or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land." * * *

In Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, the question was presented as to the power of the state to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying, on page 237, 134 U. S., and page 535, 10 Sup. Ct. (33 L. Ed. 892): "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable

relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored.

It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the nonpayment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further, the penalty is imposed, not upon all corporations charged with the quasi public duty of transportation, but only upon those charged with a particular form of that duty. So the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But, if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. Railway Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they

are engaged,—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorneys' fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state.

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while, in certain cases, there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. * * *

Judgment reversed.

Mr. Justice GRAY [with whom concurred FULLER, C. J., and WHITE, J.], dissenting:

* * * The legislature of a state must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the state were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants, by prolonged litigation, and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party, or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts. * * *

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## LINDSLEY v. NATURAL CARBONIC GAS CO.

(Supreme Court of United States, 1911. 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369.)

[Appeal from United States Circuit Court for the Southern District of New York. A New York statute, as interpreted by the local courts, forbade the wasteful or unreasonable pumping from wells bored into the rock of a certain class of mineral waters having an excess of carbonic acid gas, for the purpose of extracting or vending such gas as a commodity separate from the water in which it occurred, provided that said mineral water was drawn from a source of supply common to other surface owners and that such pumping was injurious to such other owners. Plaintiff company was engaged at Saratoga Springs, N. Y., in the occupation thus forbidden, and sought an injunction in the Circuit Court against the enforcement of the statute. Upon demurrer plaintiff's bill was dismissed, and plaintiff appealed.]

Mr. Justice VAN DEVANTER. * * * Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects.

The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36, 41, 27 Sup. Ct. 243, 51 L. Ed. 357, 359; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 256, 28 Sup. Ct. 89, 52 L. Ed. 195, 197; Munn v. Illinois, 94 U. S. 113, 132, 24 L. Ed. 77, 86; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615, 19 Sup. Ct. 553, 43 L. Ed. 823, 831.

Unfortunately, the allegations of the bill shed but little light upon the classification in question. They do not indicate that pumping from wells not penetrating the rock appreciably affects the common supply therein, or is calculated to result in injury to the rights of others, and neither do they indicate that such pumping as is done for purposes other than collecting and vending the gas apart from the waters is excessive or wasteful, or otherwise operates to impair the rights of others. In other words, for aught that appears in the bill, the classification may rest upon some substantial difference between pumping from wells penetrating the rock and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters and pumping for other purposes, and this difference may afford a reasonable basis for the classification.

In thus criticising the bill, we do not mean that its allegations are alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. Brown v. Piper, 91 U. S. 37, 43, 23 L. Ed. 200, 202; Brown v. Spilman, 155 U. S. 665, 670, 15 Sup. Ct. 245, 39 L. Ed. 304, 305; New Mexico ex rel. McLean v. Denver & R. G. R. Co., 203 U. S. 38, 51, 27 Sup. Ct. 1, 51 L. Ed. 78, 86; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 111, 28 Sup. Ct. 58, 52 L. Ed. 121, 126. But we rest our criticism upon the fact that the bill is silent in respect of some matters which, although essential to the success of the present contention, are

neither within the range of common knowledge nor otherwise plainly subject to judicial notice. So, applying the rule that one who assails the classification in such a law must carry the burden of showing that it is arbitrary, we properly might dismiss the contention without saying more. But it may be well to mention other considerations which make for the same result.

From statements made in the briefs of counsel and in oral argument, we infer that wells not penetrating the rock reach such waters only as escape naturally therefrom through breaks or fissures; and if this be so, it well may be doubted that pumping from such wells has anything like the same effect—if, indeed, it has any—upon the common supply or upon the rights of others, as does pumping from wells which take the waters from within the rock, where they exist under great hydrostatic pressure.

As respects the discrimination made between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes, this is to be said: The greater demand for the gas alone, and the value which attaches to it in consequence of this demand, furnish a greater incentive for exercising the common right excessively and wastefully when the pumping is for the purpose prescribed than when it is for other purposes; and this suggestion becomes stronger when it is reflected that the proportion of gas in the commingled fluids as they exist in the rock is so small that to obtain a given quantity of gas involves the taking of an enormously greater quantity of water, and to satisfy appreciably the demand for the gas alone involves a great waste of the water from which it is collected. Thus, it well may be that in actual practice the pumping is not excessive or wasteful save when it is done for the purpose prescribed.

These considerations point with more or less persuasive force to a substantial difference, in point of harmful results, between pumping from wells penetrating the rock, and pumping from those not penetrating it, and between pumping for the purpose of collecting and vending the gas apart from the waters, and pumping for other purposes. If there be such a difference, it justifies the classification, for plainly a police law may be confined to the occasion for its existence. As is said in Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 26 Sup. Ct. 66, 50 L. Ed. 246, 250: "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms." * * *

Decree affirmed.

## STRAUDER v. WEST VIRGINIA.

(Supreme Court of United States, 1880. 100 U. S. 303, 25 L. Ed. 664.)

[Writ of error to the Supreme Court of West Virginia. Strauder was indicted for murder in West Virginia, was tried, convicted and sentenced; the judgment being affirmed by the state Supreme Court. At the time the laws of the state confined the right to serve upon grand and petit juries to white male citizens of the state over twenty-one years old. Strauder was a negro, and appropriate exceptions to his trial by such juries were made on his behalf and overruled.]

Mr. Justice STRONG. * * * In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color. * * *

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. * * *

[After quoting section 1 of the fourteenth amendment:] This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some states laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their

training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the fourteenth amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the state in which they reside). It ordains that no state shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those states where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the

laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that state, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the states in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no state shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the states to extend equality of protection. * * *

We do not say that within the limits from which it is not excluded by the amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.

We do not believe the fourteenth amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., supra: "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The fourteenth amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution. * * *

Judgment reversed.

[FIELD, J., dissented, and CLIFFORD, J., concurred with him.]

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## PLESSY v. FERGUSON.

(Supreme Court of United States, 1896. 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256.)

[Error to the Supreme Court of Louisiana. A Louisiana statute required railway companies to provide equal, but separate, accommodations for white and colored passengers, and made it a misdemeanor for any passenger to insist upon going into a coach reserved for persons of the other race. Plessy, a person of one-eighth African blood, was prosecuted for a violation of this statute before Ferguson, judge of the criminal court in the parish of Orleans. Plessy petitioned the state Supreme Court for writs of prohibition and certiorari to enjoin said judge from punishing him under said statute. From a denial of this petition this writ of error was taken.]

Mr. Justice BROWN. * * * The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily

imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of Roberts v. City of Boston, 5 Cush. (Mass.) 198, in which the supreme judicial court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. * * * Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia (sections 281–283, 310, 319, Rev. St. D. C.), as well as by the legislatures of many of the states, and have been generally, if not uniformly, sustained by the courts. State v. McCann, 21 Ohio St. 210; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895; Ward v. Flood, 48 Cal. 36; Bertonneau v. Directors of City Schools, 3 Woods, 177, Fed. Cas. No. 1,361; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; Cory v. Carter, 48 Ind. 337, 17 Am. Rep. 738; Dawson v. Lee, 83 Ky. 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state. State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42. * * *

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. * * *

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this

there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. * * * The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. * * * Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. * * *

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion. BREWER, J., did not sit.]

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## MULLER v. OREGON.

**(Supreme Court of United States, 1908. 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957.)**

[Error to the Supreme Court of Oregon. An Oregon statute (Laws 1903, p. 148) forbade the employment of any female in any mechanical establishment, factory, or laundry in the state for more than ten hours during any one day. Muller was convicted and fined for violating this statute in the conduct of his laundry. This judgment of the circuit court of Multnomah county was affirmed by the state Supreme Court.]

Mr. Justice BREWER. * * * The single question is the constitutionality of the statute under which the defendant was convicted, so far as it affects the work of a female in a laundry. * *

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. * * *

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis for the defendant in error is a very copious collection of all these matters, an epitome of which is found in the margin.[7]

While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: Com. v. Hamilton Mfg. Co., 120 Mass. 383; Wenham v. State, 65 Neb. 394, 400, 406, 91 N. W. 421, 58 L. R. A. 825; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; Com. v. Beatty, 15 Pa. Super. Ct. 5, 17. Against them is the case of Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315.

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.

[7] Here are collected references to all American and European legislation restricting the hours of labor of women, and a summary of extracts from over 90 official reports to the effect that long hours of labor are dangerous to women.

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge. * * *

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As [a] minor, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality.

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so

far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her. * * *

For these reasons, and without questioning in any respect the decision in Lochner v. New York, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is affirmed.

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## III. Due Process of Law [8]

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### HURTADO v. CALIFORNIA.

**(Supreme Court of United States, 1884. 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.)**

[Error to the Supreme Court of California. The California Constitution of 1879 provided that offences theretofore prosecuted by indictment should be prosecuted by information after examination and commitment by a magistrate, or by indictment, as might be prescribed by law. Hurtado was found guilty of murder by a jury, after an information had been filed against him, and was sentenced to death. His objections to the proceeding by information were overruled by the California Supreme Court, and this writ of error was taken.]

[8] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 217–225.

Mr. Justice MATTHEWS. * * * It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the fourteenth article of amendment of the Constitution of the United States, which is in these words: "Nor shall any state deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law. * * *

It is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the state; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones v. Robbins, 8 Gray (Mass.) 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. * * *

Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase, nisi per legale judicium parium suorum vel per legem terræ, "But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case."

Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to

Lord Coke's comment upon it, he says: "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."

This accords with what is said in Westervelt v. Gregg, 12 N. Y. 202, 212, 62 Am. Dec. 160, by Denio, J.: "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government."

The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheat. 235–244, 4 L. Ed. 559: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And the conclusion rightly deduced is, as stated by Mr. Cooley, Constitutional Limitations, 356: "The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen."

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in Den ex dem. Murray v. Hoboken Land & Improvement Company, 18 How. 272, 15 L. Ed. 372. There, Mr. Justice Curtis, delivering the opinion of the court, after showing (page 276) that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows: "To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This, it is argued, furnishes an indispensable test of what constitutes "due process of law"; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law.

But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. For at first the words nisi per legale judicium parium had no reference to a jury; they applied only to the pares regni, who were the constitutional judges in the court of exchequer and coram rege. Bac. Abr. "Juries," (7th Ed. Lond.) note; 2 Reeve, Hist. Eng. Law, 41. And as to the grand jury itself, we learn of its constitution and functions from the assize of Clarendon, (A. D. 1164,) and that of Northampton, (A. D. 1176,) Stubbs, Chart. 143–150. * * * "The system thus established," says Mr. Justice Stephens, (1 Hist. Crim. Law Eng. 252,) "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is, nevertheless, to be banished. Accusation, therefore, was equivalent to banishment, at least." When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time,

new expression and greater effect to modern ideas of self-government. * * *

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, suum cuique tribuere. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would re-

ceive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim founded on the essential nature of law, as a just and reasonable expression of the public will, and of government as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application, but have no power over the substance of original justice." Tract on Popery Laws, 6 Burke's Works, (Ed. Little & Brown) 323.

Such is the often repeated doctrine of this court. In Munn v. Illinois, 94 U. S. 113–134, 24 L. Ed. 77, the Chief Justice, delivering the opinion of the court, said: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." And in Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678, the court said: "A trial by jury in suits at common law pending in state courts is not, therefore, a privilege or immunity of national citizenship which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state." * * *

We are to construe this phrase in the fourteenth amendment by the usus loquendi of the Constitution itself. The same words are contained in the fifth amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself." It then immediately adds: "nor be deprived of life, liberty, or property without due process of law." According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, "due process of law" was not meant or intended to include, ex vi termini, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. "The fourteenth amendment," as was said by Mr. Justice Bradley in Missouri v. Lewis, 101 U. S. 22–31, 25 L. Ed. 989, "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding."

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. * * * Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offence of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a reg-

ular judicial trial, conducted precisely as in cases of indictments. * * *

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion.]

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## HAGAR v. RECLAMATION DIST. NO. 108.

(Supreme Court of United States, 1884. 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.)

[Appeal from the federal Circuit Court for California. A California statute provided for the creation by county boards of supervisors of reclamation districts out of overflowed lands so situated as to be susceptible of one mode of reclamation. After the necessary expenses of reclamation had been estimated commissioners appointed by the supervisors were to assess upon each acre reclaimed or benefited an amount proportionate to the whole expense and to the benefits of the reclamation. Hagar's land was included in such a district and he refused to pay his assessment. Suits were brought against him to enforce liens on his land for the assessment. These suits were removed to the federal Circuit Court, which held the liens valid and ordered the land sold to satisfy them.]

Mr. Justice FIELD. * * * The objections urged to the validity of the assessment on federal grounds are substantially these: that the law under which the assessment was made and levied conflicts with the clause of the fourteenth amendment of the Constitution declaring that no state shall deprive any person of life, liberty, or property without due process of law. * * * It is sufficient to observe here that by "due process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. Hurtado v. California, 110 U. S. 516, 536, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing

no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty, or property. Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: "It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state, as to the mode, form, and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction." State Tax on Foreign-Held Bonds, 15 Wall. 300, 319, 21 L. Ed. 179.

Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes, (not dependent upon the extent of his business,) and, generally, specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be

no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.

In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the tax-payer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In Davidson v. New Orleans, this court decided this precise point. * * * The court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appro-

priate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." 96 U. S. 97, 24 L. Ed. 616.

This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. Reclamation Dist. No. 108 v. Evans, 61 Cal. 104. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans Case, these words, as used in the Constitution, can have no definite meaning. * * *

Decrees affirmed.

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## TWINING v. NEW JERSEY.

(Supreme Court of United States, 1908. 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97.)

[Error to the Court of Errors and Appeals of New Jersey. Twining and another were convicted in the Monmouth court of quarter sessions of a high misdemeanor in deceiving a state bank examiner, and were sentenced to six and four years of imprisonment respectively. In accordance with the law of the state, the jury were instructed that they might draw an unfavorable inference against the defendants' failure to testify in denial of evidence tending to incriminate him. The convictions being affirmed by the state appellate courts, this writ was taken on the ground that compulsory self-incrimination had been enforced against the defendants in violation of due process of law.]

Mr. Justice MOODY. * * * The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was gener-

ally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions. * * * The privilege was not included in the federal Constitution as originally adopted, but was placed in one of the ten amendments which were recommended to the states by the first Congress, and by them adopted. Since then all the states of the Union have, from time to time, with varying form, but uniform meaning, included the privilege in their Constitutions, except the states of New Jersey and Iowa, and in those states it is held to be part of the existing law. * * * [After referring to the historical interpretation of "due process of law" set forth in Murray v. Hoboken Land Co., referred to in Hurtado v. California, ante, p. 400:]

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in Hurtado v. California, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Charta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore, Ev. § 2250 (see for the colonies, note 108); Hallam's Constitutional History of England, chapter 8, Widdleton's American Ed. vol. 2, p. 37 (describing the criminal jurisdiction of the court of star chamber); Bentham's Rationale of Judicial Evidence, book 9, chap. 3, § 4. * * * [Here follow references to particular English and colonial practices in this regard.]

But, without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? * * * In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision; not the rights fundamental in citizenship, state or national, for they are secured otherwise; but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process.

One aid to the solution of the question is to inquire how the

right was rated during the time when the meaning of due process was in a formative state, and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts, covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right secured by Magna Charta to be condemned only by the law of the land, and sets forth, by way of grievance, divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased.

The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Charta, or the due process of law which is its equivalent. * * * [Here follow references to the amendments to the original Constitution proposed by the states ratifying it.]

Thus it appears that four only of the thirteen original states insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three states proposing amendments were silent upon this subject. It is worthy of note that two of these four states did not incorporate the privilege in their own Constitutions, where it would have had a much wider field of usefulness, until many years after. New York in 1821 and Rhode Island in 1842 (its first Constitution). This survey does not tend to show

that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but, on the other hand, a right separate, independent, and outside of due process. Congress, in submitting the amendments to the several states, treated the two rights as exclusive of each other. Such also has been the view of the states in framing their own Constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court, save one (State v. Height, 117 Iowa, 650, 91 N. W. 935, 59 L. R. A. 437, 94 Am. St. Rep. 323), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565, 572; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345), and that there shall be notice and opportunity for hearing given the parties (Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; and see Londoner v. Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law. * * *

The cases proceed upon the theory that, given a court of justice

which has jurisdiction, and acts, not arbitrarily, but in conformity, with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. * * * [Here follow quotations from various cases to this effect.]

In Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. Ed. 989, Mr. Justice Bradley, speaking for the whole court, said in effect, that the fourteenth amendment would not prevent a state from adopting or continuing the civil law instead of the common law. This dictum has been approved and made an essential part of the reasoning of the decision in Holden v. Hardy, 169 U. S. 387, 389, 18 Sup. Ct. 383, 42 L. Ed. 789, 790, and Maxwell v. Dow, 176 U. S. 598, 20 Sup. Ct. 448, 494, 44 L. Ed. 597. The statement excludes the possibility that the privilege is essential to due process, for it hardly need be said that the interrogation of the accused at his trial is the practice in the civil law.

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient. See Wigmore, Ev. § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before Constitutions themselves. * * *

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion.]

## UNITED STATES v. JU TOY.

(Supreme Court of United States, 1905. 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.)

Mr. Justice HOLMES. This case comes here on a certificate from the circuit court of appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the steamship Doric for return to China, presented a petition for habeas corpus to the district court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued, and the United States made return, and answered, showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive, and that no abuse of authority was shown. These were denied, and the district court decided, seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the circuit court of appeals, alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions: * * *

"Third. In a habeas corpus proceeding in a district court of the United States, instituted * * * [upon the grounds of this case], should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same, and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or, in some other way, in hearing and determining the same, committed prejudicial error?" * * *

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in United States v. Sing Tuck, 194 U. S. 161, 167, 920, 24 Sup. Ct. 621, 48 L. Ed. 917, that the act of August 18, 1894 (28 Stat. 372, 390, c. 301, § 1 [U. S. Comp. St. 1901, p. 1303]), purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 97, 724, 23 Sup. Ct. 611, 613, 47 L. Ed. 721, it was said: "That

Congress may exclude aliens of a particular race from the United States, prescribe the terms and conditions upon which certain classes of aliens may come to this country, establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See, also, United States ex rel. Turner v. Williams, 194 U. S. 279, 290, 291, 24 Sup. Ct. 719, 48 L. Ed. 979, 983, 984; Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121, 1125. In Fok Young Yo v. United States, 185 U. S. 296, 304, 305, 22 Sup. Ct. 686, 46 L. Ed. 917, 921, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082, where the petitioner for habeas corpus alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases, and the language which we have quoted, is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts. United States v. Sing Tuck, 194 U. S. 161, 167, 24 Sup. Ct. 621, 48 L. Ed. 917, 920; Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 39 L. Ed. 1082, 15 Sup. Ct. Rep. 967. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894 (28 Stat. 372, c. 301), is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what

remains. That has been decided over and over again * * * [citing U. S. v. Reese, 92 U. S. 214, and other cases]. It necessarily follows that when such words are sustained, they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. In re Ross (Ross v. McIntyre) 140 U. S. 453, 464, 11 Sup. Ct. 897, 35 L. Ed. 581, 586. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer, and that his decision is due process of law, was affirmed and explained in Nishimura Ekiu v. United States, 142 U. S. 651, 660, 12 Sup. Ct. 336, 35 L. Ed. 1146, 1149, and in Fong Yue Ting v. United States, 149 U. S. 698, 713, 13 Sup. Ct. 1016, 37 L. Ed. 905, 913, before the authorities to which we already have referred. It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How. 272, 280, 15 L. Ed. 372, 376, to show that the requirement of a judicial trial does not prevail in every case. Lem Moon Sing v. United States, 158 U. S. 538, 546, 547, 15 Sup. Ct. 967, 39 L. Ed. 1082, 1085; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 100, 23 Sup. Ct. 611, 47 L. Ed. 721, 725; Public Clearing House v. Coyne, 194 U. S. 497, 508, 509, 24 Sup. Ct. 789, 48 L. Ed. 1092, 1098.

We are of opinion that * * * the third question should be answered, "Yes." * * *

So certified.

[BREWER, J., gave a dissenting opinion, in which PECKHAM, J., concurred. DAY, J., also dissented.]

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## DENT v. WEST VIRGINIA.

(Supreme Court of United States, 1889. 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623.)

See ante, p. 231, for a report of this case.

# POLITICAL AND PUBLIC RIGHTS[1]

## UNITED STATES v. WONG KIM ARK.

(Supreme Court of United States, 1898. 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.)

[Appeal from the United States District Court for the Northern District of California. The collector of the port of San Francisco denied admission to the country to Wong Kim Ark, a Chinese person who was admitted to have been born in California and to be then returning from a temporary visit to China. He was ordered to be discharged upon a writ of habeas corpus, and the United States appealed.]

Mr. Justice GRAY. * * * The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of president." The fourteenth article of amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof,

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 234, 244.

are citizens of the United States and of the state wherein they reside," also declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the fifteenth article of amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627; Ex parte Wilson, 114 U. S. 417, 422, 5 Sup. Ct. 935, 29 L. Ed. 89; Boyd v. U. S., 116 U. S. 616, 624, 625, 6 Sup. Ct. 524, 29 L. Ed. 746; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Comm. 336; Bradley, J., in Moore v. U. S., 91 U. S. 270, 274, 23 L. Ed. 346. * * *

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, "Protectio trahit subjectionem, et subjectio protectionem,"—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.

This fundamental principle, with these qualifications or explanations of it, was clearly, though quaintly, stated in the leading case known as Calvin's Case, or the Case of the Postnati, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Coke, 1, 4b–6a, 18a, 18b; Ellesmere, on Postnati, 62–64; s. c. 2 How. St. Tr. 559, 607, 613–617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Litt. 8a, 128b; Lord Hale, in Harg. Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Comm. 366, 369, 370, 374; 4 Bl. Comm. 74, 92; Lord Kenyon, in Doe v. Jones, 4 Term R. 300, 308; Cockb. Nat. 7; Dicey, Confl. Laws, pp. 173–177, 741. * * *

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England [2] of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. * * *

In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99, 7 L. Ed. 617, * * * Mr. Justice Story [said]: "Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto. There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." 3 Pet. 155, 7 L. Ed. 617. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." 3 Pet. 156, 7 L. Ed. 617. "Nothing is better settled at the common law than the doctrine that the children, even of aliens, born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 3 Pet. 164, 7 L. Ed. 617. * * *

[2] **The authorities quoted and cited by the court use the words "British dominions" instead of "England."**

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicile"; and children born in a foreign country, of a French father who had not established his domicile there, nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." * * * The Code Napoléon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, jus soli, the rule of descent or blood, jus sanguinis, as the leading principle. * * *

The later modifications of the rule in Europe rest upon the Constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English naturalization act of 33 Vict. (1870) c. 14, and the commissioners' report of 1869, out of which it grew, both bear date since the adoption of the fourteenth amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Confl. Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockb. Nat. 14–21.

There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the Constitution of the United States there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport, and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. * * *

It was enacted by the statute of February 10, 1855, c. 71, that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." 10 Stat. 604; Rev. St. § 1993 (U. S. Comp. St. 1901, p. 1268).

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty. * * *

V. * * * The first section of the fourteenth amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford (1857) 19 How. 393, 15 L. Ed. 691; and to put it beyond doubt that all blacks, as well as

whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. Slaughter House Cases (1873) 16 Wall. 36, 73, 21 L. Ed. 394; Strauder v. West Virginia (1879) 100 U. S. 303, 306, 25 L. Ed. 664; Ex parte Virginia (1879) 100 U. S. 339, 345, 25 L. Ed. 676; Neal v. Delaware (1880) 103 U. S. 370, 386, 26 L. Ed. 567; Elk v. Wilkins (1884) 112 U. S. 94, 101, 5 Sup. Ct. 41, 28 L. Ed. 643. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the Slaughter House Cases, above cited. * * *

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the fourteenth amendment, made this remark: "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States." 16 Wall. 73, 21 L. Ed. 394. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness as if the case before the court had called for an exact definition of the phrase is apparent from its classing foreign ministers and consuls together; whereas it was then well settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his intercourse with foreign states, or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent, Comm. 44; Story, Confl. Laws, § 48; Wheat. Int. Law (8th Ed.) § 249; The Anne (1818) 3 Wheat. 435, 445, 446, 4 L. Ed. 428; Gittings v. Crawford (1838) Taney, 1, 10, Fed. Cas. No. 5,465; In re Baiz (1890) 135 U. S. 403, 424, 10 Sup. Ct. 854, 34 L. Ed. 222. * * *

The only adjudication that has been made by this court upon the meaning of the clause "and subject to the jurisdiction thereof," in the leading provision of the fourteenth amendment, is Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized or taxed or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen

of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds that the meaning of those words was "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance"; that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in congress and direct taxes were apportioned among the several states, and congress was empowered to regulate commerce, not only "with foreign nations," and among the several states, but "with the Indian tribes"; that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States of ambassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the first section of the civil rights act of 1866, by the very Congress which framed the fourteenth amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99–103, 5 Sup. Ct. 44–46, 28 L. Ed. 643. * * *

The decision in Elk v. Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the fourteenth amendment of the Constitution, in qualifying the words "all persons born in the United

States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. Calvin's Case, 7 Coke, 1, 18b; Cockb. Nat. 7; Dicey, Confl. Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155, 7 L. Ed. 617; 2 Kent, Comm. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court. * * * [Here follows a quotation from United States v. Rice, 4 Wheat. 246, 4 L. Ed. 562 (1819), to the effect that the military occupation of a part of Maine by the British during the War of 1812 temporarily suspended the sovereignty of the United States there.]

In the great case of The Exchange (1812) 7 Cranch, 116, 3 L. Ed. 287, the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards, in Cherokee Nation v. Georgia (1831) 5 Pet. 1, 8 L. Ed. 25; nor upon the case of a suspension of the sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in U. S. v. Rice, above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The Chief Justice first laid down the general principle: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the un-

certainties of construction; but, if understood, not less obligatory." 7 Cranch, 136, 3 L. Ed. 287.

He then stated, and supported by argument and illustration, the propositions that "this full and absolute territorial jurisdiction, being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power," has "given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation," the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation"; "a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers"; "a third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions"; and, in conclusion, that "a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country." 7 Cranch, 137–139, 147, 3 L. Ed. 287. * * *

The reasons for not allowing to other aliens exemption "from the jurisdiction of the country in which they are found" were stated as follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." 7 Cranch, 144, 3 L. Ed. 287. * * *

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the fourteenth amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship. * * *

This sentence of the fourteenth amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well-considered opinions of the executive departments of the government, since the adoption of the fourteenth amendment of the Constitution. * * * [Here follow quotations from these opinions, which hold] that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extraterritorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country. * * *

The foregoing considerations and authorities irresistibly lead us to these conclusions: The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only

so long as he remain within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Rep. 6a, "strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject"; and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's Case in 1851, and since repeated by this court: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations." Executive Documents H. R. No. 10, 1st Sess. 32d Cong. p. 4; 6 Webster's Works, 526; Carlisle v. United States, 16 Wall. 147, 155, 21 L. Ed. 426; Calvin's Case, 7 Rep. 6a; Ellesmere, Postnati, 63; 1 Hale, P. C. 62; 4 Bl. Comm. 74, 92. * * *

VI. * * * It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject, always bearing in mind that statutes enacted by Congress, as well as treaties made by the president and senate, must yield to the paramount and supreme law of the Constitution.

The power, granted to Congress by the Constitution, "to establish an uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in congress. Chirac v. Chirac (1817) 2 Wheat. 259, 4 L. Ed. 234. For many years after the establishment of the original Constitution, and until two years after the adoption of the fourteenth amendment, congress never authorized the naturalization of any one but "free white persons." * * * By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent"; and it was amended by the act of Feb. 18, 1875, c. 80, by inserting the words above printed in brackets. Rev. St. (2d Ed.) § 2169,

18 Stat. 318 (U. S. Comp. St. 1901, p. 1333). Those statutes were held, by the Circuit Court of the United States in California, not to embrace Chinese aliens. In re Ah Yup (1878) 5 Sawy. 155, Fed. Cas. No. 104. And by the act of May 6, 1882, c. 126, § 14, it was expressly enacted that, "hereafter no state court or court of the United States shall admit Chinese to citizenship." 22 Stat. 61 (U. S. Comp. St. 1901, p. 1333).

In Fong Yue Ting v. U. S. (1893), above cited, this court said: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." 149 U. S. 716, 13 Sup. Ct. 1023, 37 L. Ed. 905. * * *

The power of naturalization, vested in congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. * * *

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic." Rev. St. § 1999, re-enacting Act July 27, 1868, c. 249, § 1, 15 Stat. 223, 224 (U. S. Comp. St. 1901, p. 1269). Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry. * * *

Order affirmed.

[FULLER, C. J., gave a dissenting opinion, in which HARLAN, J., concurred.]

## MAXWELL v. DOW.

(Supreme Court of United States, 1900. 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597.)

[Error to the Supreme Court of Utah. Upon an information filed against Maxwell, charging him with robbery, he was tried in Utah by a jury of eight jurors, was found guilty, and sent to prison. He applied for a writ of habeas corpus upon the ground, among others, that this procedure, though authorized by the Utah Constitution, abridged his privileges and immunities as a citizen of the United States, in violation of the fourteenth amendment of the federal Constitution. The Utah Supreme Court denied his petition, and this writ of error was taken.]

Mr. Justice PECKHAM. * * * What are the privileges and immunities of a citizen of the United States which no state can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the sixth amendment to the federal Constitution, there can be no doubt. Thompson v. Utah, 170 U. S. 343, 349, 18 Sup. Ct. 620, 42 L. Ed. 1061. And as the right of trial by jury in certain suits at common law is preserved by the seventh amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all federal courts where a jury trial is held. American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079; Springville v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172.

It would seem to be quite plain that the provision in the Utah Constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the sixth amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the states. In order to limit the powers which it was feared might be claimed or exercised by the federal government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several states by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states. This has been many times decided. * * *

It is claimed, however, that since the adoption of the fourteenth amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the Spies Case, 123 U. S. 131, 151, 8 Sup. Ct. 22, 31 L. Ed. 80; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular state, was treated by Mr. Justice Miller in delivering the opinion of the court. He stated that the argument in favor of the plaintiffs, claiming that the ordinance of the city of New Orleans was invalid, rested wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the Fourteenth Amendment are the same as to citizens of the United States and citizens of the several states. This he showed to be not well founded; that there was a citizenship of the United States and a citizenship of the states, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of the citizen of the United States that were placed by the amendment under the protection of the federal Constitution, and that the privileges and immunities of a citizen of a state, whatever they might be, were not intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested.

He then proceeded to inquire as to the meaning of the words "privileges and immunities" as used in the amendment, and said that the first occurrence of the phrase in our constitutional history is found to be in the fourth article of the old Confederation, in which it was declared "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties,

impositions, and restrictions as the inhabitants thereof respectively." A provision corresponding to this he found in the Constitution of the United States in section 2 of the fourth article, wherein it is provided that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." What those privileges were is not defined in the Constitution, but the justice said there could be but little question that the purpose of both those provisions was the same, and that the privileges and immunities intended were the same in each. He then referred to the case of Corfield v. Coryell, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania, in 1823 (4 Wash. C. C. 371, Fed. Cas. No. 3,230), where the question of the meaning of this clause in the Constitution was raised. Answering the question, what were the privileges and immunities of citizens of the several states, Mr. Justice Washington said in that case:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Having shown that prior to the fourteenth amendment the legislation under review would have been regarded as relating to the privileges or immunities of citizens of the state, with which the United States had no concern, Justice Miller continued:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the federal government for their existence or protection, beyond the very few express limitations which the federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protec-

tion of all the civil rights, which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And, still further, such a construction, followed by the reversal of the judgments of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people,—the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them."

If the rights granted by the Louisiana legislature did not infringe upon the privileges or immunities of citizens of the United States, the question arose as to what such privileges were, and in enumerating some of them, without assuming to state them all, it was said that a citizen of the United States, as such, had the right to come to the seat of government to assert claims or transact business, to seek the protection of the government or to share its offices; he had the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several states; to demand the care and protection of the general government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; the right,

with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of habeas corpus, and to use the navigable waters of the United States, however they may penetrate the territory of the several states; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any state in the Union by a bona fide residence therein, with the same rights as other citizens of that state; and the rights secured to him by the thirteenth and fifteenth amendments to the Constitution. A right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the state, and not covered by the amendment. * * *

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a state against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the fourteenth amendment of which it treats.

The definition of the words "privileges and immunities," as given by Mr. Justice Washington, was adopted in substance in Paul v. Virginia, 8 Wall. 168, 180, 19 L. Ed. 360, and in Ward v. Maryland, 12 Wall. 418, 430, 20 L. Ed. 453. These rights, it is said in the Slaughter-House Cases, have always been held to be the class of rights which the state governments were created to establish and secure. * * *

It was said in Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627, that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in Re Kemmler, 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. Ed. 519, 524, it was stated by the present Chief Justice that: "The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United

States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394." * * *

In Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the fourteenth amendment. * * *

This case shows that the fourteenth amendment in forbidding a state to abridge the privileges or immunities of citizens of the United States does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the federal courts is specially secured to all persons in the cases mentioned in the seventh amendment.

Is any one of the rights secured to the individual by the fifth or by the sixth amendment any more a privilege or immunity of a citizen of the United States than are those secured by the seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the fourteenth amendment prohibits the abridgement by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen. * * * Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the federal government, whether citizen or not. * * *

In Re Kemmler, 136 U. S. 436, 448, 10 Sup. Ct. 930, 34 L. Ed. 519, 524, it was stated that it was not contended and could not be that the eighth amendment to the federal Constitution was intended to apply to the states. * * * In Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615, it was held that the second amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the

national government, and not of the states. * * * In O'Neil v. Vermont, 144 U. S. 323, 332, 12 Sup. Ct. 693, 36 L. Ed. 450, 456, it was stated that as a general question it has always been ruled that the eighth amendment to the Constitution of the United States does not apply to the states. In Thorington v. Montgomery, 147 U. S. 490, 13 Sup. Ct. 394, 37 L. Ed. 252, it was said that the fifth amendment to the Constitution operates exclusively in restraint of federal power, and has no application to the states.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the federal Constitution against the powers of the federal government. They were decided subsequently to the adoption of the fourteenth amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them. * * *

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion.]

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POPE v. WILLIAMS (1904) 193 U. S. 621, 632–634, 24 Sup. Ct. 573, 48 L. Ed. 817, Mr. Justice PECKHAM (affirming a decision of the Court of Appeals of Maryland):

"The simple matter to be herein determined is whether, with reference to the exercise of the privilege of voting in Maryland, the legislature of that state had the legal right to provide that a person coming into the state to reside should make the declaration of intent a year before he should have the right to be registered as a voter of the state.

"The privilege to vote in any state is not given by the federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627, such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote; others refuse them

that privilege. A state, so far as the federal Constitution is concerned, might provide by its own Constitution and laws that none but native-born citizens should be permitted to vote, as the federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the federal Constitution, already stated; although it may be observed that the right to vote for a member of congress is not derived exclusively from the state law. See Const. U. S. art. 1, § 2; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84. But the elector must be one entitled to vote under the state statute. Id., Id. See, also, Swafford v. Templeton, 185 U. S. 487, 491, 22 Sup. Ct. 783, 46 L. Ed. 1005, 1007. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the state might be regarded by others as reasonable or unreasonable is not a federal one. We do not wish to be understood, however, as intimating that the condition in this statute is unreasonable or in any way improper.

"We are unable to see any violation of the federal Constitution in the provision of the state statute for the declaration of the intent of a person coming into the state before he can claim the right to be registered as a voter. The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the state, by persons coming therein to reside (and that is as far as it is necessary to consider it in this case), is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, nor a violation of any implied guaranties of the federal Constitution. The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them.

"It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against, the individual rights of a citizen of the United States removing into the state, and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular state from which the person came, excluding from that privilege, for instance, a citizen of the

United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other state. In such case an argument might be urged that, under the fourteenth amendment of the federal Constitution, the citizen from Georgia was, by the state statute, deprived of the equal protection of the laws. Other extreme cases might be suggested. We neither assert nor deny that, in the case supposed, the claim would be well founded that a federal right of a citizen of the United States was violated by such legislation, for the question does not arise herein. * * *"

Judgment affirmed.

# EX POST FACTO LAWS[1]

## THOMPSON v. MISSOURI.

(Supreme Court of United States, 1898. 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204.)

[Error to Supreme Court of Missouri. Thompson was indicted for murder in 1894, the evidence against him being wholly circumstantial. One issue of fact concerned the authorship of a prescription for strychnine and of a letter addressed to a church organist. Thompson denied that he had written either, and at the first trial certain letters written by him to his wife were admitted in evidence for comparison with the writing in the other documents. Thompson was convicted, but a new trial was ordered on appeal; the Missouri Supreme Court holding that the letters to his wife were erroneously admitted in evidence. Subsequently, in 1895, the legislature passed an act permitting such a comparison to be made. At the second trial in 1896 the letters were again used in evidence, Thompson was again convicted, and the conviction affirmed on appeal.]

Mr. Justice HARLAN. * * * The contention of the accused is that, as the letters to his wife were not, at the time of the commission of the alleged offense, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was ex post facto when applied to his case.

It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions. Mr. Justice Chase, in his classification of ex post facto laws in Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648, includes "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

In Kring v. Missouri, 107 U. S. 221, 228, 232, 235, 2 Sup. Ct. 443, 27 L. Ed. 506, the question arose as to the validity of a statute of Missouri under which the accused was found guilty of the crime of murder in the first degree, and sentenced to be hanged. That case was tried several times, and was three times in the supreme court of the state. At the trial immediately preceding the last one Kring was allowed to plead guilty of murder in the second degree. The plea was accepted, and he was sentenced to im-

[1] For discussion of principles, see Black, Const. Law (3d Ed.) § 273.

prisonment in the penitentiary for the term of 25 years. Having understood that upon this plea he was to be sentenced to imprisonment for only 10 years, he prosecuted an appeal, which resulted in a reversal of the judgment. At the last trial the court set aside the plea of guilty of murder in the second degree,—the accused having refused to withdraw it,—and, against his objection, ordered a plea of not guilty to be entered in his behalf. Under the latter plea he was tried, convicted, and sentenced to be hanged. By the law of Missouri at the time of the commission of Kring's offense, his conviction and sentence under the plea of guilty of murder in the second degree was an absolute acquittal of the charge of murder in the first degree. But, that law having been changed before the final trial occurred[2] Kring contended that the last statute, if applied to his case, would be within the prohibition of ex post facto laws. And that view was sustained by this court, four of its members dissenting. * * *

Considering the suggestion that the Missouri statute under which Kring was convicted only regulated procedure, Mr. Justice Miller, speaking for this court, said: "Can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." In conclusion it was said: "Tested by these criteria, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an ex post facto law within the meaning of the Constitution of the United States." * * *

The right to such protection was deemed a substantial one,—indeed, it constituted a complete defense against the charge of murder in the first degree,—that could not be taken from the accused by subsequent legislation. This is clear from the statement in Kring's Case that the question before the court was whether the statute of Missouri deprived "the defendant of any right of defense which the law gave him when the act was committed, so that, as to that offense, it is ex post facto."

This general subject was considered in Hopt v. Utah, 110 U. S. 574, 588, 589, 4 Sup. Ct. 202, 28 L. Ed. 262. Hopt was indicted, tried, and convicted of murder in the territory of Utah, the punishment therefor being death. At the time of the commission of the offense it was the law of Utah that no person convicted of a felony

[2] The law was changed before the first plea of guilty of murder in the second degree was made. See Kring v. Missouri, 107 U. S. 236–239, 2 Sup. Ct. 443, 27 L. Ed. 506. Even under the original law the defendant had no right to make this plea, except with the consent of the prosecution. Id.

could be a witness in a criminal case. After the date of the alleged offense, and prior to the trial of the case, an act was passed removing the disqualification as witnesses of persons who had been convicted of felonies; and the point was made that the statute, in its application to Hopt's Case, was ex post facto.

This court said: "The provision of the Constitution which prohibits the states from passing ex post facto laws was examined in Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. * * * That decision proceeded upon the ground that the state Constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed. But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed."

The court added: "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime, and the amount or degree of proof essential to conviction, only remove

existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged." * * *

Applying the principles announced in former cases, without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined, we adjudge that the statute of Missouri relating to the comparison of writings is not ex post facto when applied to prosecutions for crimes committed prior to its passage. If persons excluded upon grounds of public policy at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offense. Nor can the new rule introduced by it be characterized as unreasonable; certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime.

The statute did not require "less proof, in amount or degree," than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury; and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of

the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality, for the rule established by it gave to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writing upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of handwritings, and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.

Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the ex post facto clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the substantial guaranties of life and liberty that are secured to an accused by the supreme law of the land.

Judgment affirmed.

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## HAWKER v. NEW YORK.

(Supreme Court of United States, 1898. 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002.)

[Error to the Court of Sessions of New York City. The defendant had been convicted of the crime of abortion in New York in 1878 and sentenced to ten years imprisonment. A New York statute of 1893, amended in 1895, made it a misdemeanor for any person to practice medicine after conviction of a felony. The defendant was convicted under this statute and the conviction affirmed by the highest state court; final judgment being entered in the said Court of Sessions.]

Mr. Justice BREWER. The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment. * * *

On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and, after the defendant has once fully atoned for his offense, a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is ex post facto.

On the other, it is insisted that, within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practice medicine; and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character. In support of this latter argument, counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. In the footnote [3] will be found his collection.

We are of opinion that this argument is the more applicable, and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In Dent v. West Virginia, 129 U. S. 114, 122, 9 Sup. Ct. 231, 233, 32 L. Ed. 623, it was said in respect to the qualifications of a physician: "The power of the

[3] This collection of statutes (Hawker v. New York, 170 U. S. 191–193, 18 Sup. Ct. 574, 575, 42 L. Ed. 1004, 1005) shows that six or seven American states, Great Britain, and a number of self-governing British colonies give a similar effect to a conviction of felony.

state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud." * * * [Here follow quotations from various state decisions holding that a good moral character may be required as a condition of the right to practice medicine.]

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. County Seat of Linn Co., 15 Kan. 500–528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity." Dent v. West Virginia, 129 U. S. 122, 9 Sup. Ct. 233, 32 L. Ed. 623.

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and, if it may make a violation of criminal law a test of bad character; what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of res judicata, and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is

not conclusive. We must look at the substance, and not the form; and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence; would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform, and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law, one convicted of crime was incompetent as a witness; and this rule was in no manner affected by the lapse of time since the commission of the offense, and could not be set aside by proof of a complete reformation. So, in many states a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. Washington v. State, 75 Ala. 582, 51 Am. Rep. 479. In Foster v. Commissioners, 102 Cal. 483, 492, 37 Pac. 763, 41 Am. St. Rep. 194, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before."

In a certain sense such a rule is arbitrary, but it is within the power of a legislature to perscribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is, after all, but an illustration of the power to classify." Jones v. Brim, 165 U. S. 180, 183, 17 Sup. Ct. 282, 41 L. Ed. 677. * * *

Judgment affirmed.

[HARLAN, J., gave a dissenting opinion, in which concurred PECKHAM and MCKENNA, JJ.]

# LAWS IMPAIRING THE OBLIGATIONS OF CONTRACTS [1]

## NEW ORLEANS WATERWORKS CO. v. LOUISIANA SUGAR REFINING CO.

(Supreme Court of United States, 1888. 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607.)

[Error to the Supreme Court of Louisiana, which had affirmed a judgment of the civil district court of New Orleans in favor of the Louisiana Sugar Company, denying an injunction against laying water pipes asked by the plaintiff. The facts appear in the opinion.]

Mr. Justice GRAY. The plaintiff, in its original petition, relied on a charter from the legislature of Louisiana, which granted to it the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi river, but provided that the city council should not be thereby prevented from granting to any person "contiguous to the river" the privilege of laying pipes to the river for his own use. The only matter complained of by the plaintiff, as impairing the obligation of the contract contained in its charter, was an ordinance of the city council, granting to the Louisiana Sugar Refining Company permission to lay pipes from the river to its factory, which, the plaintiff contended, was not contiguous to the river. The Louisiana Sugar Refining Company, in its answer, alleged that its factory was contiguous to the river; that it had the right as a riparian proprietor to draw water from the river for its own use; that its pipes were being laid for its own use only; that the plaintiff had no exclusive privilege that would impair such use of the water by the defendant company; and that the rights and privileges claimed by the plaintiff would constitute a monopoly, and be therefore null and void. The evidence showed that the pipes of the defendant company were being laid exclusively for the use of its factory, and that no private ownership intervened between it and the river, but only a public street, and a broad quay or levee, owned by the city and open to the public, except that some large sugar sheds, occupied by lessees of the city, stood upon it, and that the tracks of a railroad were laid across it. * * *

The only grounds on which the plaintiff in error attacks the judgment of the state court are that the court erred in its construction of the contract between the state and the plaintiff, contained

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 279–294.

in the plaintiff's charter; and in not adjudging that the ordinance of the city counsel, granting to the defendant company permission to lay pipes from its factory to the river, was void, because it impaired the obligation of that contract. * * *

This being a writ of error to the highest court of a state, a federal question must have been decided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment. * * *

In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. This court, therefore, has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller: "It must be the Constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the state court must sustain the law or Constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise." Railroad Co. v. Rock, 4 Wall. 177, 181, 18 L. Ed. 381. "We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." Knox v. Bank, 12 Wall. 379, 383, 20 L. Ed. 287.

As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. In Williams v. Bruffy, 96 U. S. 176, 183, 24 L. Ed. 716, it was said by Mr. Justice Field, delivering judgment: "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited relating to the jurisdiction of this court," (Rev. St. § 709;) and it was therefore held that a statute of

the so-called Confederate States, if enforced by one of the states as its law, was within the prohibition of the Constitution. So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. U. S. v. New Orleans, 98 U. S. 381, 392, 25 L. Ed. 225; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197. * * *

But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should "be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use." The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonably interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. Railroad Co. v. Ellerman, 105 U. S. 166, 172, 26 L. Ed. 1015; Day v. Green, 4 Cush. (Mass.) 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the Constitution or laws of the United States. * * *

[After discussing various cases:] These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court

of a state, giving effect to a statute of the state, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the state court did impair the obligation of the previous contract, is not concluded by the opinion of the state court as to the validity or the construction of that contract, even if contained in a statute of the state, but determines for itself what that contract was. Leading cases of that class are Bridge Propr's v. Hoboken Co., 1 Wall. 116, 17 L. Ed. 571, in which the state court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the state with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the state court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. Bank v. Knoop, 16 How. 369, 14 L. Ed. 977; Trust Co. v. Debolt, Id. 416, 14 L. Ed. 997; Bank v. Debolt, 18 How. 380, 15 L. Ed. 458; Bank v. Skelly, 1 Black, 436, 17 L. Ed. 173; New Jersey v. Yard, 95 U. S. 104, 24 L. Ed. 352; Railroad v. Gaines, 97 U. S. 697, 709, 24 L. Ed. 1091; University v. People, 99 U. S. 309, 25 L. Ed. 387; Railroad v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; Gas-Light Co. v. Shelby Co., 109 U. S. 398, 3 Sup. Ct. 205; Railroad Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770. In each of those cases, the state court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right; and thus gave effect to the law of the state drawn in question as impairing the obligation of a contract. The distinction between the two classes of cases,—those in which the state court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract,—as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in Railroad v. Railroad, 14 Wall. 23, 20 L. Ed. 850. That was a writ of error to the supreme judicial court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubt-

edly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. Bridge Propr's v. Hoboken Co., 1 Wall. 116, 17 L. Ed. 571. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made by the laws then in existence. Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme judicial court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. Rector v. Ashley, 6 Wall. 142, 18 L. Ed. 733; Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635; Steines v. Franklin County, 14 Wall. 15, 20 L. Ed. 846. The writ of error must therefore be dismissed for want of jurisdiction." Id. 25, 26.

The result of the authorities, applying to cases of contracts the settled rules that in order to give this court jurisdiction of a writ of error to a state court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and, if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground

that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction. In the present case, the supreme court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the state, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the Constitution or any law of the state subsequent to the plaintiff's charter. * * *

Case dismissed for want of jurisdiction.

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## OGDEN v. SAUNDERS.

**(Supreme Court of United States, 1827. 12 Wheat. 213, 6 L. Ed. 606.)**

[Error to the United States District Court for Louisiana. Ogden, then a citizen of New York, accepted in that state certain bills of exchange drawn upon him in 1806 in Kentucky, of which Saunders became the owner. Ogden later became a citizen of Louisiana, and was there sued in assumpsit by Saunders upon the bills, in the above-named court. One of Ogden's pleas was a discharge in bankruptcy in New York, under an act passed there in 1801. On a special verdict finding those facts, the plaintiff received judgment, and Odgen took this writ of error. Saunders was a citizen of Kentucky. Several somewhat similar cases were argued at the same time.]

Mr. Justice WASHINGTON. * * * What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of Sturges v. Crowninshield,[2] to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, which law is referred to in the above definition, still remains to be solved. It cannot, for a moment, be con-

[2] 4 Wheat. 117, 4 L. Ed. 529 (1819), holding invalid all discharges of debtors by insolvency or bankruptcy laws passed *subsequently* to the making of the contracts affected thereby.

ceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind which the parties to it are free to obey or not, as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I, therefore, feel no objection to answer the question asked by the same counsel—What law it is which constitutes the obligation of the compact between Virginia and Kentucky—by admitting, that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this Constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true that this is exclusively the law, to which the Constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign states of this Union would have consented to; for it will be found, upon examination, that there are few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construc-

tion, or duration, or discharge of contracts? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance ; the latter may affect and control the validity, construction, evidence, remedy, performance, and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true that the law of the country where the contract is made or to be executed, forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that if the municipal law of the state where the contract is so made form a part of it, so does that clause of the Constitution which prohibits the states from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with and forming a part of the contract, does, in effect, impair its obligation; and before this can be proved, it must be affirmed and satisfactorily made out, that if, by the terms of the

contract, it is agreed that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say, that the soundness of it is beyond the reach of my mind to understand.

Again, it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid (if the view which I take of this case be correct), as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and, in the former case, in which the repeal contains no enactment, the Constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy. Laws against usury are of the first description. A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second. The statute of frauds, and the statute of limitations, may be cited as examples of the last two.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate; because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do, if this be the operation of a bankrupt law upon such contracts, it would seem to follow that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the Constitution; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the Constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned

counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts afterwards entered into, which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court, in the case of Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529, that, "if, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that, whichever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see if it can, upon any intelligible principle, be distinguished from a bankrupt law, when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead

it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice, at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract. * * * [Here follows mention of further similarities in the legal effects of the two laws, in that the bar of each may be waived by the debtor's subsequent promise, without a new consideration, and that each must be pleaded by the debtor to bar the creditor's remedy upon the original obligation.]

[JOHNSON, THOMPSON, and TRIMBLE, JJ., gave concurring opinions; and MARSHALL, C. J., gave a dissenting opinion [3] for himself and DUVALL and STORY, JJ., in the course of which he said: "If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control and should be discharged as the legislature might prescribe, would become a component part of every contract and be one of its conditions." 12 Wheat. 339, 6 L. Ed. 606. The remainder of the case upon another point is omitted.]

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## FLETCHER v. PECK.

**(Supreme Court of United States, 1810. 6 Cranch, 87, 3 L. Ed. 162.)**

[Error to the United States Circuit Court for Massachusetts. Fletcher brought an action of covenant in that court against Peck, and, upon the facts and pleadings stated in the opinion below, the court gave judgment for Peck upon the third count, overruling a demurrer to Peck's plea thereto.]

Mr. Chief Justice MARSHALL. * * * This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia,

[3] This is Chief Justice Marshall's only dissenting opinion upon a constitutional question. In the 34 years he was upon the bench he wrote 519 out of the 1,106 opinions delivered in the court. He dissented altogether but 8 times. Carson, Sup. Ct. of U. S., 206, note.

the contract for which was made in the form of a bill passed by the legislature of that state. * * *

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting as before that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder. * * *

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been

made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. * * *

The Constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their op-

eration, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an ex post facto law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally engrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract, was suable in the courts of the United States for

that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. * * *

Judgment affirmed.

Mr. Justice JOHNSON [dissenting on two points]. * * * Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil-law idea of the word, will all support it. But the difficulty arises on the word "obligation," which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is functus officio the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done. * *

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## STONE v. MISSISSIPPI.

(Supreme Court of United States, 1879. 101 U. S. 814, 25 L. Ed. 1079.)

[Error to the Mississippi Supreme Court. In 1867 the state legislature chartered a corporation empowered for 25 years to conduct a lottery in consideration of the payment to the state of $5,000, an annual sum of $1,000, and ½ per cent. of the proceeds of its sale of tickets. In 1868 and 1870 a new Constitution and a statute forbade all lotteries in the state. A quo warranto proceeding against the managers of the company for violating these later acts was sustained by the state Supreme Court, and this writ of error was taken.]

Mr. Chief Justice WAITE. * * * If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the state and the people of the state in that way. * * *

The question is therefore directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Company v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989.

In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexaticus interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not however without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bar-

gain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, mala in se, but, as we have just seen, may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

Judgment affirmed.

## NEW ORLEANS GAS CO. v. LOUISIANA LIGHT CO.

(Supreme Court of United States, 1885. 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.)

[Appeal from the United States Circuit Court for the Eastern District of Louisiana. In 1875 the New Orleans Gas Company became the owner of an exclusive legislative grant to supply gas in New Orleans by pipes in the street for 50 years from that date. The state Constitution of 1879 purported to abolish this monopoly provision, and in 1881 the Louisiana Light Company was organized under a general law and authorized by the city of New Orleans to supply gas through street pipes. The New Orleans Company sought to enjoin this in the above-named court. A demurrer to the bill was sustained on the ground of the plaintiff's not being properly incorporated, and this appeal was taken. The Supreme Court held that the plaintiff was properly incorporated and then dealt with the validity of the plaintiff's alleged exclusive contract.]

Mr. Justice HARLAN. * * * The manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. * * * For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the city of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the state could rightfully make provision. * * * Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city acting under legislative authority. Dill. Mun. Corp. (3d Ed.) § 691; State v. Cincinnati Gas Co., 18 Ohio St. 262. See, also, Boston v. Richardson, 13 Allen (Mass.) 146. * * * It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Company,—to whose rights and franchises the present plaintiff has succeeded,—so far as it created a corporation with au-

thority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted * * * a contract * * * within the provision of the Constitution. * * *

But it is earnestly insisted that, since the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature, in respect to those subjects. It is, consequently, claimed that the state may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the national Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered. * * * [Here follow references to the Slaughter-House Cases, 16 Wall. 36, 62, 21 L. Ed. 394, Stone v. Mississippi, 101 U. S. 814, 818, 25 L. Ed. 1079, Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. Ed. 23, and Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923—cases suggesting definitions of the "police power."] Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land. * * *

That the police power, according to its largest definition, is restricted in its exercise by the national Constitution, is further shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts the obligations of which are fully protected against impairment by state enactments. * * * [Here follow references to Bridge Prop'rs v. Hoboken Co., 1 Wall. 116, 17 L. Ed. 571, The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137, and other cases.] Numerous other cases could be cited as establishing the doctrine that the state may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. Asylum v. New Orleans, 105 U. S. 368, 26 L. Ed. 1128; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. Ed. 495; New Jersey v. Wilson, 7 Cranch, 166, 3 L. Ed. 303; Bank of Ohio v. Knoop, 16 How. 376, 14 L. Ed. 977; Gordon

v. Appeal Tax Courts, 3 How. 133, 11 L. Ed. 529; Wilmington R. R. v. Reid, 13 Wall. 266, 20 L. Ed. 568; Humphrey v. Pegues, 16 Wall. 248, 249, 21 L. Ed. 326; Farrington v. Tennessee, 95 U. S. 689, 24 L. Ed. 558.

If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations,—it is difficult to perceive upon what ground we can deny her authority, when not forbidden by her own organic law, in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies. The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends. * * * [Here follows an examination of Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989, Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036, Stone v. Mississippi, supra, p. 461, and Butch. Un. Co. v. Cres. City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585.]

The principle upon which [these] decisions * * * rest is that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority, given by the state, to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. For, as we have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is

a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety. * * * It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the state was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants by means of a valid contract with a private corporation of her own creation. * * *

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the state, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations, not inconsistent with the essential rights granted by plaintiff's charter, necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas-pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations. * * *

The article in the state Constitution 1879 in relation to monopolies is not, in any legal sense, an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy previously pursued of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects.

* * * If, in the judgment of the state, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result with respect to corporations whose contracts with the state are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. West River Bridge Co. v. Dix [6 How. 507, 12 L. Ed. 535] ubi supra; Richmond, etc., R. Co., v. Louisa. R. Co., 13 How. 71, 83, 14 L. Ed. 55; Boston Water-power Co. v. Boston & W. R. Corp., 23 Pick. (Mass.) 360, 393; Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray (Mass.) 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the state that the contract with them will be performed. * * *

Decree reversed.

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## TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

(Supreme Court of United States, 1819. 4 Wheat. 518, 4 L. Ed. 629.)

[The facts are stated in the opinion below.]

MARSHALL, C. J. This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the Legislature of New Hampshire, passed on the 27th of June and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the Constitution of the United States; otherwise, it finds for the plaintiffs. The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the Constitution of the United States? * * *

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the Legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The President of the Senate, the Speaker of the House of Representatives of New Hampshire, and the Governor and Lieutenant-Governor of Vermont, for the time being, are to be members ex officio. The board is to be completed by the Governor and Council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are, 1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily

and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to his case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the col-

lege be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character. * * * [Here is recited the success of Rev. Eleazer Wheelock in establishing a charity school for the religious instruction of Indians, his solicitation of money and land to establish a college in New Hampshire to extend the undertaking and to promote learning among the English, and his appointment of trustees of the property contributed.] Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth and any others," the charter was granted, and the Trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow. * * * [Here are mentioned the charter powers of the trustees to appoint a president and members of the instructing body of the college, to fill vacancies in their own body, and to make regulations for the government of the col-

lege, not repugnant to law and not excluding persons for their religious sentiments or professions.] This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter, it is apparent that the funds of the college consisted entirely of private donations. * * * Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is then an eleemosynary (1 Bl. Com. 471) and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern and a proper subject of legislation, all admit. That there may be an institution founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered. * * *

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary; not from the application of those funds, for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to

effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property, in a particular form and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The

benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. * * * The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. * * * The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth and any others." So that the objects of the contributors and the incorporating act were the same,—the promotion of Christianity and of education generally, not the interests of New Hampshire particularly. * * *

Yet a question remains to be considered of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest so long

as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the Constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. * * *

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real

and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it? * * *

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the Constitution did not deem

them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it; and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it. * * *

The opinion of the court, after mature deliberation is, that this is a contract, the obligation of which cannot be impaired without

violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the Legislature of New Hampshire to which the special verdict refers. * * *

On the effect of this law two opinions cannot be entertained. Between acting directly and acting through the agency of trustees and overseers no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given, they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given. * * *

Judgment reversed.

[Washington and Story, JJ., gave concurring opinions. Livingston, J., concurred in all the opinions, Johnson, J., concurred in Chief Justice Marshall's opinion, and Duvall, J., dissented.]

## CHARLES RIVER BRIDGE v. WARREN BRIDGE.

(Supreme Court of United States, 1837. 11 Pet. 420, 9 L. Ed. 773.)

[Error to the Massachusetts Supreme Court. In 1785 Massachusetts by statute incorporated a company, "The Proprietors of the Charles River Bridge," empowered to erect a bridge between Boston and Charleston in the place where there was then a ferry, and to take certain tolls for the use thereof. The charter was limited to 40 years and until its expiration the company was to pay £200, annually to Harvard College, which had owned the ferry superseded by the bridge. The bridge was opened in 1786, and in 1792 the company charter was extended to 70 years. In 1828 Massachusetts incorporated the Warren Bridge Company to erect another bridge over the Charles river a few rods from the first bridge. The new bridge was to be a free bridge at the end of 6 years, or sooner if the tolls paid its cost before then. The original bridge company asked an injunction in the state courts against the erection and use of the Warren bridge, which was denied by an equal division of the state Supreme Court. This writ of error was then taken. Before its argument the Warren bridge had become free.]

Mr. Chief Justice TANEY. * * * [After discussing the original ferry franchise and other matters unconnected with the contract clause of the Constitution:] This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge"; and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the court say: "The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim

nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the states, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done

in a like case in an English court of justice. * * * [Here follows a brief discussion of several cases, the chief of which, Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939 (1830), decided that a charter incorporating a bank with the usual powers carried with it no exemption from state taxation upon the banking business.]

The case now before the court is, in principle, precisely the same. It is a charter from a state. The act of incorporation is silent in relation to the contested power. The argument in favor of the Proprietors of the Charles River Bridge is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground

that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the state would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785 to the Proprietors of the Charles River Bridge. * * * The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain; and that they impaired or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words

which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the state, unless it shall appear by plain words that it was intended to be done. * * *

And what would be the fruits of this doctrine of implied contracts on the part of the states, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns, and are prepared

to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results. * * *

Judgment affirmed.

[McLEAN, J., concurred in the result. STORY, J., gave an elaborate dissenting opinion, in which THOMPSON, J., concurred.]

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## PIQUA BRANCH OF STATE BANK OF OHIO v. KNOOP.

(Supreme Court of United States, 1853. 16 How. 369, 14 L. Ed. 977.)

[Error to Ohio Supreme Court. An Ohio statute of 1845 authorized the incorporation of banks subject to the provisions of the act. It provided that each company accepting the act and complying therewith should pay 6 per cent. of its semi-annual profits to the state, in lieu of all taxes to which the company or its stockholders would otherwise be subject. The Piqua Bank was organized under this act in 1847, as a branch of the State Bank of Ohio. In 1851 a state statute purported to subject the capital stock, surplus, and contingent fund of banks in the state to the same taxation as other personal property. The state's suit against the Piqua Branch for taxes under the act of 1851 was sustained by the state courts, and this writ of error was taken.]

Mr. Justice McLEAN. * * * The idea that a state, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth; and so is the argument that if a state may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the taxpayer. The same may be said of every power where there is an exercise of judgment. * * *

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time

the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the state, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the state and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America, and by all civilized states where the common or the civil law is established. * * *

There is no constitutional objection to the exercise of the power to make a binding contract by a state. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the state a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the state. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the state cannot barter away any part of its sovereignty. No one ever contended that it could.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

It must be admitted that the state has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the Constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion, that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the state, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any state in the Union, which did not contain some exemptions from general taxation. The act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that act shall not extend to any joint-stock company which now is, or may hereafter be organized, whose charter or act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same act, there are eighteen exemptions from taxation.

The federal government enters into an arrangement with a foreign state for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either state? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty, or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign state may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it. The Constitution of the Union, when first adopted, made states subject to the federal judicial power. Could a state, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect the Constitution was very properly changed, as no state should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the Supreme Court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual. This is a matter which can have no influence in deciding the legal question. The state did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is as strong on the state, from the privileges granted and accepted, as if a bonus had been paid. * * *

Judgment reversed.

[TANEY, C. J., gave a concurring opinion. CATRON, DANIEL, and CAMPBELL, JJ., gave dissenting opinions.][4]

[4] The grounds of this dissent are indicated by the following extract from a similar dissenting opinion of Miller, J., sixteen years later, in Washington University v. Rouse, 8 Wall. 439, 443, 444, 19 L. Ed. 498 (1869): "We do not believe that any legislative body, sitting under a state Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the state. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and

## VON HOFFMAN v. QUINCY.

(Supreme Court of United States, 1866. 4 Wall. 535, 18 L. Ed. 403.)

[Error to the United States Circuit Court for the Southern District of Illinois. The city of Quincy, Ill., issued bonds in aid of railroads, under statutes authorizing the levy of a special tax upon property therein sufficient to pay the annual interest on such bonds and to be devoted to this purpose only. A subsequent statute reduced the city's taxing powers for debts and general expenses to ½ per cent., which would leave nothing for these bonds after paying current expenses. Von Hoffman petitioned in the above-named court for a mandamus to compel the city and its officers to levy taxes under the original acts and pay a judgment for interest on said bonds, which he had recovered against the city. Upon judgment for the city upon his petition, Von Hoffman took this writ of error.]

Mr. Justice SWAYNE. * * * It is * * * settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful. It cannot be maintained, that this power to bargain away, for an unlimited time, the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government. The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity. With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

est after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. Green v. Biddle, 8 Wheat. 92, 5 L. Ed. 547; Bronson v. Kinzie, 1 How. 319, 11 L. Ed. 143; McCracken v. Hayward, 2 How. 612, 11 L. Ed. 397; People v. Bond, 10 Cal. 570; Ogden v. Saunders, 12 Wheat. 231, 6 L. Ed. 606.

In Green v. Biddle, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the states of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a state, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the district of Kentucky "derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that state. So far as they affected the lands covered by the compact, this court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

In Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.

In McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397. the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason. * * *

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute

declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." Sturges v. Crowninshield, 4 Wheat. 157, 4 L. Ed. 529. The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In Green v. Biddle, 8 Wheat. 84, 5 L. Ed. 547, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." Planters' Bank v. Sharp et al., 6 How. 327, 12 L. Ed. 447.

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. Beers v. Haughton, 9 Pet. 359, 9 L. Ed. 145; Ogden v. Saunders, 12 Wheat. 230, 6 L. Ed. 606; Mason v. Haile, 12 Wheat. 373, 6 L. Ed. 660; Sturges v. Crowninshield, 4 Wheat. 200, 4 L. Ed. 529. They may also exempt from sale, under

execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143; McCracken v. Hayward, 2 How. 608, 11 L. Ed. 397.

If these doctrines were res integræ the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in Mason v. Haile, 12 Wheat. 379, 6 L. Ed. 660. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. New Jersey v. Wilson, 7 Cranch, 166, 3 L. Ed. 303; Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; Piqua Branch v. Knoop, 16 How. 369, 14 L. Ed. 977. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation

to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. People v. Bond, 10 Cal. 570; Dominic v. Sayre, 5 N. Y. Super. Ct. 555.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right, of no practical value, and render the protection of the Constitution a shadow and a delusion. * * *

Judgment reversed.

# RETROACTIVE LAWS [1]

## INHABITANTS OF GOSHEN v. INHABITANTS OF STONINGTON.

(Supreme Court of Errors of Connecticut, 1822. 4 Conn. 209, 10 Am. Dec. 121.)

[Motion for new trial. Joseph Cooke was legally settled in the town of Stonington, and in 1807 was married to Betsey Cooke by an ordained but itinerant minister of the Methodist church. The statute law then in force gave no validity to such marriages unless the minister were *settled* instead of itinerant. In 1820 a statute purported to render valid to all intents and purposes marriages performed by ordained ministers qualified thereto by the forms and usages of any religious society. If constitutional, this statute validated Cooke's marriage. From 1818 to 1820 the town of Goshen had supported Betsey Cooke and five children of herself and Joseph, as paupers, and in 1821 sued to recover the expense thereof from Stonington, which was legally chargeable therewith if said marriage was valid. A verdict was found for the plaintiffs under a direction of the court upholding the curative statute of 1820, and defendants moved for a new trial.]

HOSMER, C. J. * * * First, it was said that the retrospective operation of the law may and ought to be obviated by construing it to intend the validation of marriages merely, without imparting to it any retrospection as to the rights of others. It must be admitted that by construction, if it can be avoided, no statute should have a retrospect, anterior to the time of its commencement. Helmore v. Shuter et al., 2 Show. 17; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 485, 5 Am. Dec. 291. This principle is founded on the supposition, that laws are intended to be prospective only. But when a statute, either by explicit provision or necessary implication, is retroactive, there is no room for construction; and if the law ought not to be effectuated, it must be on a different principle. The act of May, 1820, is, in its expression, inconvertibly clear and definite. It does not pause, after imparting validity to marriages, but confirms them "to all intents and purposes." By this phraseology, they are declared to be valid ab initio. * * *

Secondly, it has been insisted, that the law in question is unconstitutional. There is no pretence that it is opposed to the Constitution of the United States; that is, that the confirmatory act is a

[1] For discussion of principles, see Black, Const. Law (3d Ed.) §§ 295–299.

law ex post facto, or one which impairs the obligation of contracts. By the second article of the Constitution of Connecticut, it is affirmed that "the powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit—those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." The law of May, 1820, has been considered as the exercise of a judiciary power, and for this reason, in contravention of the Constitution; but the supposition is wholly destitute of support, as the act in question does not affect to give a construction to the former law, but most manifestly purports to impart validity to certain proceedings which were erroneously supposed to be legal and which the statute did not authorize. The power exercised, in its nature, is exclusively legislative, and not opposed to the recited articles of the Constitution.

Lastly, the defendants have insisted, (and on this objection the principal stress has been laid), that the law of May, 1820, being retrospective and in violation of vested rights, it is the duty of the court to pronounce it void. The retrospection of the act is indisputable, and equally so is its purpose to change the legal rights of the litigating parties. Whether in doing this there has been injustice, will be an enquiry in a subsequent part of my opinion.

It is universally admitted and unsusceptible of dispute that there may be retrospective laws impairing vested rights which are unjust, neither according with sound legislation nor the fundamental principles "of the social compact." If, for example, the legislature should enact a law, without any assignable reason, taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity.

On the other hand, laws of a retroactive nature affecting the rights of individuals, not adverse to equitable principle and highly promotive of the general good, have often been passed, and as often approved. In the case before us, the defendants have expressly conceded that the law in question is valid, so far as respects the persons de facto married and their issue. But, in that event, would it not have a retrospective operation on vested rights? The man and woman were unmarried, notwithstanding the formal ceremony which passed between them, and free, in point of law, to live in celibacy, or contract matrimony with any person, at pleasure. It is a strong exercise of power, to compel two persons to marry, without their consent; and a palpable perversion of strict legal right. At the same time, the retrospective law, thus far directly operating on vested rights, is admitted to be unquestionably valid, because it is manifestly just.

I very much question whether there is an existing government in which laws of a retroactive nature and effect, impairing vested rights but promotive of justice and the general good, have not been passed. In England, such laws frequently have been enacted; and the act of 26 Geo. II, cap. 33, giving validity to former marriages celebrated in any parish church or public chapel, is precisely of this description. Doug. 661, note. In the neighboring state of Massachusets there have been many such laws (Foster et al. v. Essex Bank, 16 Mass. from 257 to 261, 8 Am. Dec. 135); and the interposition of our own legislature, in similar cases, is familiar to gentlemen of the profession. The judgments of courts, when by accident a term has fallen through, have been established; the doings of a committee and conservator, not strictly legal, have been confirmed; and other laws have been passed, all affecting vested rights; but, being incontrovertibly just, no disapprobation has ever been expressed. * * *

I cannot harmonize with those who deny the power of the legislature to make laws in any case, which, with entire justice, operate on antecedent legal rights. A retrospective law may be just and reasonable; and the right of the legislature to enact one of this description I am not speculatist enough to question. * * * The act of May, 1820, was intended to quiet controversy and promote the public tranquility. Many marriages had been celebrated, as was believed, according to the prescriptions of the statute. On a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear that there had been an honest misconstruction of the law; that many unions, which were considered as matrimonial, were really meretricious; and that the settlement of children, in great numbers, was not in the towns of which their fathers were inhabitants, but in different places. To furnish a remedy coextensive with the mischief the legislature have passed an act, confirming the matrimonial engagements supposed to have been formed and giving to them validity as if the existing law had precisely been observed. The act intrinsically imports that the legislature considered the law of May, 1820, to be conformable to justice, and within the sphere of their authority. It was no violation of the Constitution; it was not a novelty; such exercise of power having been frequent, and the subject of universal acquiescence; and no injustice can arise from having given legal efficacy to voluntary engagements, and from accompanying them with the consequences, which they always impart. * * *

New trial denied.[2]

[PETERS, J., thought the act unconstitutional, but concurred in the result on other grounds.]

[2] In Mech. Sav. Bank v. Allen, 28 Conn. 97, 102 (1859), in upholding a statute validating certain prior loans where usury had been innocently committed, McCurdy, J., said: "This subject was thoroughly investigated in the

UNITED STATES v. HEINSZEN (1907) 206 U. S. 370, 382, 386, 387, 27 Sup. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688, Mr. Justice WHITE (upholding a federal statute of 1906, ratifying the collection of tariff duties illegally imposed upon imports into the Philippine Islands between 1899 and 1902, and passed while this suit was pending to recover them as paid under protest):

"That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. * * * [Here are discussed Hamilton v. Dillin, 21 Wall. 73, 22 L. Ed. 528, and Mattingly v. Dist. Columbia, 97 U. S. 687, 24 L. Ed. 1098.]

"It is urged that the ratifying statute cannot be given effect without violating the fifth amendment to the Constitution, since to give efficacy to the act would deprive the claimants of their property without due process of law, or would appropriate the same for public use without just compensation. This rests upon these two contentions: It is said that the money paid to discharge the illegally exacted duties after payment, as before, 'justly and equitably belonged' to the claimants, and that the title thereto continued in them as a vested right of property. It is consequently insisted that the right to recover the money could not be taken away without violating the fifth amendment, as stated. But here, again, the argument disregards the fact that when the duties were illegally exacted in the name of the United States Congress possessed the power to have authorized their imposition in the mode in which they were enforced, and hence, from the very moment of collection, a right in Congress to ratify the transaction, if it saw fit to do so, was engendered. In other words, as a necessary result of the power to ratify, it followed that the right to recover the duties in question was subject to the exercise by Congress of its undoubted power to ratify. * * *

case of Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121, and the questions now raised were elaborately discussed and were supposed to be settled. The retroactive law objected to in that case was far more extensive in its effects than the statute of 1856. It made husbands and wives of persons who, except for its provisions, were single. It made children legitimate who were otherwise bastards. It altered settlements, and conferred new rights, and imposed new duties and restrictions upon towns and individuals. It changed lines of descent and deranged rules of property. The principle adopted was, in substance, that when a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."

"But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was, in a sense, a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (vol. 2, pp. 415, 416): 'The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. Goshen v. Stonington, 4 Conn. 209, 10 Am. Dec. 121; Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542; Langdon v. Strong, 2 Vt. 234; Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; 3 Story, Const. 267.'

"Nor does the mere fact that, at the time the ratifying statute was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again, if it be conceded that the capacity to prosecute the pending suit to judgment was, in a sense, a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. * * *

"Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th Ed. p. 543): * * * 'The bringing of suit vests in a party no right to a particular decision, and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.'"

[BREWER and PECKHAM, JJ., dissented. MOODY, J., did not sit. HARLAN, J., concurred solely on the ground that the ratifying act should be construed as withdrawing the consent of the United States to be sued in the Court of Claims for said duties paid under protest, leaving the personal liability of the collector to be determined.]

# APPENDIX

## [CONSTITUTION
OF THE
## UNITED STATES OF AMERICA][1]

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**We the People** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen.

[3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[2] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Repre-

1 This copy of the Constitution (through Amendment XV) is reprinted from American History Leaflet No. 8, published by Parker P. Simmons, New York City. It was prepared by Professors Albert B. Hart and Edward Channing, of Harvard University; and is stated to be the result of a careful comparison with the original manuscripts of the Constitution and Amendments on February 10, 11, 1893, and to be intended to be absolutely exact in word, spelling, capitalization, and punctuation. It is here used by permission of the editors and publisher. One error in spelling and one in paragraphing have been corrected by a comparison with the fac-simile text of the Constitution published in Carson's History of the Celebration of the 100th Anniversary of the Constitution, and the signatures of the signers have also been corrected by this text. Three of the editors' original notes are retained, marked "*Ed.*" The other notes are by the editor of this Casebook. The words and figures inclosed in brackets do not appear in the original manuscripts and are inserted for convenience of reference, most of them being thus used in Leaflet No. 8. The text of Amendments XVI and XVII has been taken from the official certifications of adoption issued by Secretaries of State Knox and Bryan on February 25, 1913, and on May 31, 1913.

2 Superseded by Amend. XIV, [§ 2].—*Ed.*

sentatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4.] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.[3]

[2.] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5.] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2.] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[3] Superseded by Amend. XVII.

[2.] Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office.

SECTION. 7. [1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2.] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2.] To borrow Money on the credit of the United States;

[3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6.] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7.] To establish Post Offices and post Roads;

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9.] To constitute Tribunals inferior to the supreme Court;

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13.] To provide and maintain a Navy;

[14.] To make Rules for the Government and Regulation of the land and naval Forces;

[15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. [1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3.] No Bill of Attainder or ex post facto Law shall be passed.

[4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5.] No Tax or Duty shall be laid on Articles exported from any State.

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of

Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. [1.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts or grant any Title of Nobility.

[2.] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE. II.

SECTION. 1. [1.] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3.] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.[4]

4 Superseded by Amend. XII.—*Ed.*

[4.] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. [1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [1.] The judicial Power shall extent to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;[5]—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3.] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

5 See Amend. XI.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE. VI.

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.[6]

[Note of the draughtsman as to interlineations in the text of the manuscript.]

Attest
WILLIAM JACKSON
*Secretary.*

**done** in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our names.

Go WASHINGTON—
*Presidt and deputy from Virginia.*

[Here follow the names of 38 deputies representing all of the 13 states except Rhode Island.]

6 The states ratified the Constitution in the following order:

| | | | |
|---|---|---|---|
| Delaware | December 7, 1787 | South Carolina | May 23, 1788 |
| Pennsylvania | December 12, 1787 | New Hampshire | June 21, 1788 |
| New Jersey | December 18, 1787 | Virginia | June 26, 1788 |
| Georgia | January 2, 1788 | New York | July 26, 1788 |
| Connecticut | January 9, 1788 | North Carolina | November 21, 1789 |
| Massachusetts | February 6, 1788 | Rhode Island | May 29, 1790 |
| Maryland | April 26, 1788 | | |

By an act of September 13, 1788, the Congress of the Confederation appointed the first Wednesday in January next for the appointment of presidential electors in the states that

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.[7]

## [ARTICLE I.][8]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## [ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## [ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## [ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## [ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

had by then ratified the Constitution; the first Wednesday in February for the electors to assemble and vote for president; and the first Wednesday in March for commencing proceedings under the Constitution. On the latter date, March 4, 1789, the Constitution became legally operative, Owings v. Speed, 5 Wheat. 420, 15 L. Ed. 124 (1820); though in fact the House of Representatives did not assemble, for want of a quorum, until April 1, and the Senate not until April 6; and President Washington was not inaugurated until April 30.

7 This heading appears only in the joint resolution submitting the first ten amendments [1 Stat. 97].—*Ed.*

8 The first 10 amendments were proposed by Congress on September 25, 1789, and became effective on December 15, 1791.

## [ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## [ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## [ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## [ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## [ARTICLE XI.][9]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## [ARTICLE XII.][10]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-Presi-

9 The eleventh amendment was proposed by Congress on March 4, 1794, and became effective on February 7, 1795.

10 The twelfth amendment was proposed by Congress on December 8, 1803, and became effective either on June 15 or July 27, 1804, probably upon the former date.

dent, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## ARTICLE XIII.[11]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV.[12]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

11 The thirteenth amendment was proposed by Congress on January 31, 1865, and became effective on December 9, 1865.

12 The fourteenth amendment was proposed by Congress on June 13, 1866, and became effective either on July 9 or July 21, 1868.

## ARTICLE XV.[13]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.—

## ARTICLE XVI.[14]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## [ARTICLE XVII.][15]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The Electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

13 The fifteenth amendment was proposed by Congress on February 26, 1869, and became effective either on February 3 or February 17, 1870.

14 The sixteenth amendment was proposed by Congress on July 12, 1909, and became effective on February 3, 1913.

15 The seventeenth amendment was proposed by Congress on May 13, 1912, and became effective on May 9, 1913.

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